795.

SUPREME COURT OF THE UNITED STATES.

No. 46.

SEBASTIAN HIRIART, PLAINTIFF IN ERROR,

VERSUS

JEAN GASSIES BALLON.

IN ERROR TO THE DISTRICT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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DISTRICT COURT OF THE UNITED STATES, } ss.
Eastern District of Louisiana, }

[No. 3,321.]

Be it remembered, that, on the 26th day of July, A. D. 1833, into the district court of the United States for the eastern district of Louisiana, came Sebastien Hiriart, and, by his attorney, John Slidell, esq., filed the following petition for an injunction, to wit:

To the Honorable Samuel H. Harper, judge of the district court of the United States, in and for the eastern district of the State of Louisiana, humbly showeth the petition of Sebastien Hiriart, residing in said State, in the parish of West Baton Rouge:

That, on the first day of June last, a judgment was rendered by your honorable court against your petitioner and one Pierre Gassie, in favor of one Jean Gassies Ballon, for the sum of three thousand one hundred dollars.

That, on the day of November, 1832, execution issued thereon, and the same was levied on property belonging to said Pierre Gassie, your petitioner's co-defendant, and the sum of seventeen hundred dollars and upwards was realized by the sale, which was made by the marshal, of the property.

That further, on the first day of July last, an alias writ of fieri facias issued on said judgment for the sum of three thousand one hundred dollars, which said alias writ was levied on your petitioner's property, to wit, on a certain tract of land belonging to him, situated in the parish of Point Coupee, which property has been advertised for sale under said writ. But your petitioner avers that he is informed, and believes, that all said proceedings are informal, illegal, and irregular, for the reasons hereinafter stated, to wit:

1st. That there was no final judgment rendered against your petitioner in virtue of which said writ could issue, and the same issued irregularly.

2d. That the said writ was signed by a person styling himself deputy clerk of said honorable court; whereas, in truth and in fact, such person held no such office, had not been duly appointed and sworn to fill the same, and had no legal authority to issue said writ.

3d. That said writ issued for the entire sum for which judgment had been rendered, whereas the same should only have issued for said amount, after deducting the proceeds arising from the sale of the property of your petitioner's co-defendant, to wit, for the sum of thirteen hundred and sixty-one dollars and fifty cents.

Wherefore, your petitioner prays that a writ of injunction be granted him, that, by said writ, the marshal be enjoined from all further proceedings under, or by virtue of, said writ, particularly from selling your petitioner's property aforesaid, and for such other and further relief as his case may require.

And, as in duty, &c., &c.,
C. M. CONRAD, *for*
JOHN SLIDELL, *Attorney for Petitioner.*

Personally appeared before me, Sebastian Hiriart, the plaintiff, who made oath that the material facts contained in the foregoing petition are true.

Sworn to, before me, this 19th July, 1833.

(Signed) HIRIART.

(Signed) F. W. LEA, *Clk.*

Judge's Order.

Let an injunction issue, on the plaintiff's entering into security to answer all damages occasioned thereby, in the sum of four thousand dollars.

(Signed) SAMUEL H. HARPER, *Judge U. S.*

Bond.

Know all men by these presents, that we, Sebastien Hiriart, as principal, and Achille Rivarde, as security, are held and firmly bound unto Jean Gassies Ballon, in the just and full sum of four thousand dollars, lawful money of the United States, for the payment of which well and truly to be made to the said Jean Gassie Ballon, his heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and signed with our hands, at the city of New Orleans, this 26th day of July, A. D. 1833. The condition of the above obligation is such, that whereas the above Sebastien Hiriart has this day filed a petition in the district court of the United States for the eastern district of Louisiana, praying a writ of injunction to issue, directed to the marshal of the eastern district of Louisiana, enjoining him from proceeding in the advertisement and sale of the property of said Hiriart, seized at the suit of the said Jean Gassie Ballon, which said injunction has been granted.

Now, if the said Sebastien Hiriart and Achille Rivarde shall well and truly pay, and satisfy all damages which the said Jean Gassie Ballon may sustain by reason, or in consequence, of the issuing of said injunction, then, and in that case, this obligation to be null and void, else to be and remain in full force and virtue.

HIRIART. [SEAL.]
A. RIVARDE. [SEAL.]

Signed and sealed in presence of
(Signed) FRANKLIN W. LEA, *Clk.*

Whereupon, the following injunction issued from the Clerk's office, to wit:—

The President of the United States of America, to the Marshal of the Eastern District of Louisiana, or to his lawful Deputy—GREETING:

You are hereby strictly prohibited and enjoined from all further proceedings under, or by virtue of, a writ of execution, issued from the district court of the United States for the eastern district of Louisiana, in a case wherein Jean Gassie Ballon is plaintiff, and Pierre Gassies and Sebastien Hiriart are defendants; and more particularly from the sale of the property of the said defendant, Sebastien Hiriart; and herein fail not, under pain of the penalty that will fall thereon.

Witness, the hononorable Samuel H. Harper, judge of our said court, at the city of New Orleans, this 27th July, 1333.

(Signed) F. W. LEA, *Clk.*

Marshal's Return.

Received August 2d, 1833. By virtue of this, proceedings on the *fi. fa.* have been stayed.

(Signed) A. WADDELL, *Dep. Marshal.*

Afterwards, to wit, on the 18th day of December, 1833, at a regular and stated session of the said court, the following order of court is entered of record, to wit:

WEDNESDAY, *December* 18, 1833.

The court met, pursuant to adjournment.
Present hon. Samuel H. Harper.

SEBASTIEN HIRIART
vs.
JEAN GASSIES BALLON. } No. 3,321.

Ordered, That this cause be continued until Thursday, the 26th instant.

Afterwards, to wit, on the 26th day of December, 1833, came the defendant, Jean Gassies Ballon, by this counsel, J. J. Mercier, and, by leave of the court first obtained, filed, on the trial of the cause, the following answer, to wit:

To the Hon. Samuel H. Harper, Judge of the District Court of the United States and for the Eastern District of the State of Louisiana.

The answer of Jean Gassies Ballon to the petition of Sebastien Hiriart, praying for an injunction, showeth:

That your respondent admits that judgment has been rendered in his favor by this honorable court, and that execution has been issued regularly in due course of law, as may be seen by reference to former proceedings.

That your respondent denies, generally, all the matters and allegations contained in the above said petition.

Wherefore, defendant prays that the injunction may be set aside, with costs of court.

(Signed) J. J. MERCIER, *for Respondent.*

On the same day, to wit, the 26th day of Decembor, 1833, the following order of court was entered of record, to wit:

THURSDAY, 26*th December*, 1833.

The court met, pursuant to adjournment.
Present hon. Samuel H. Harper.

SEBASTIEN HIRIART
vs.
JEAN GASSIES BALLON. } No. 3,321.

The court having heard the arguments of counsel in this case, in part, now order that the same be set for trial on Saturday, the 28th instant, at 10 o'clock, A. M.

On the trial of this cause, an answer to the petition of the plaintiff having been filed by the defendant, on the same day the plaintiff, by his attorney, applied to the court for leave to file a supplemental petition, praying for trial by jury; but the court refused to permit said petition to be filed, on the ground that, this being a case in the nature of a suit in equity, the plaintiff was not entitled to a trial by jury, unless the court should consider the same

necessary for the trial of an issue of fact between the parties; and that the granting or refusing a jury for the trial of an issue of fact was a matter entirely within the discretion of the court.

The court then directed the case to be fixed for trial on the issue joined between the parties on Saturday, the 28th of December, to which the counsel for the plaintiff objected, on the ground that the cause could only be fixed for trial in conformity with the rules of the court in relation to suits at law; which rules are the 4th, 5th, 6th, 7th, and 9th, of the printed rules of the court, a copy of which is hereunto annexed, and is considered as embodied in this bill of exceptions; but the court overruled the objections of the plaintiff, and directed the cause to be fixed for trial as aforesaid, on the ground that this case did not come within the purview of said rules, because the same only applied to suits at law; and that this being a proceeding in equity, must be governed by the rules regulating the practice of the courts of equity of the United States. And the plaintiff excepts as well to the refusal of the court, as aforesaid, to permit the issue had between the parties to be tried by a jury, as to the fixing for trial of said cause at the time and under the circumstances hereinbefore set forth, and tenders this his bill of exceptions, which is admitted by the court.

In the title page of the pamphlet containing the rules of the court, above referred to, they are described as rules "in civil causes or suits at law, as contra distinguished from admiralty and equity causes and criminal prosecutions."

The complainant obtained an injunction, which was regularly set down for trial, among other causes, on the second day of the term, to be tried on the 18th day of December instant; and on that day a cause, having preference, occupied so much time that the court, with the assent of the counsel on both sides, continued this cause until the 26th instant, when the respondent obtained leave of the court to file a general denial of all the allegations contained in the bill of injunction.

THE GENERAL RULES

For the government of the United States' Court in the Eastern District of Louisiana, in civil causes, or suits at law, as contra distinguished from admiralty and equity causes and criminal prosecutions. Made in pursuance of the 17th section of the Judiciary act of 1789, and of the first section of the act of Congress of the 26th May, 1824, entitled "An act to regulate the mode of practice in the Courts of the United States for the District of Louisiana."

At a stated session of the Court of the United States of America, for the Eastern District of Louisiana, held at the city of New Orleans, on Monday, the fourteenth day of December, Anno Domini one thousand eight hundred and twenty-nine.

Present the hon. SAMUEL H. HARPER, Judge of said court.

Ordered, That the following rules be adopted by this court; and all other rules for the practice of this court are annulled from and after the present date.

GENERAL RULES.

Rule 1. Suits at law shall be commenced by writ or process, under the seal of the court, and signed by the clerk, and be tested in the name of the judge, (or if that office shall be vacant, of the clerk,) and shall issue in the name of the President of the United States to the marshal of the district,

commanding him to arrest or summon the defendant, (as the case may be,) and shall be returnable on the first day of each term.

Rule 2. A petition addressed to the court shall accompany the writ: it shall state the nature of the case with sufficient precision of circumstance, time, and place; which petition shall be signed by the party or his counsel, and shall contain a prayer adapted to the nature of the case; and whatever documents are referred to in the petition, as making part thereof, shall be filed with it, or if copies thereof are annexed, the defendant or his attorney shall have *oyer* of the original, if he demand it, before he shall be required to file his answer or plea. The writ and petition being filed, a copy thereof shall be made in the French and English languages, (in cases where the mother tongue of the defendant is French,) and, together with the original writ of process, be delivered to the marshal, who shall serve said copy on the defendant, by delivering the same to him personally, or by leaving it at his usual place of abode, ten days before the day of return mentioned in the writ, allowing one day in addition for every twenty miles the defendant may reside from New Orleans. The writ or process shall run in the words which have hitherto been adopted in this court. The marshal shall, whenever any writ or process shall have been served, endorse on the same the time of service and its distance from the city, if the same be made out of the limits thereof.

Rule 3. The answer or defence of the defendant shall be signed by him or his attorney, and filed with the clerk in the English and French languages, (if the mother tongue of the plaintiff be French,) on or before the first day of each term; and if no defence or answer shall be filed, nor time given for answer, the court shall, at the first day of sitting thereafter, on the application of plaintiff, cause judgment by default to be entered against the defendant, which if not set aside within three days thereafter, the court shall, if required, enter up final judgment against the defendant; if the demand be liquidated by a note, bond, contract, or former judgment, and if the sum demanded be uncertain, the court shall proceed to hear testimony, assess the damages, and render final judgment for the sum so assessed.

Rule 4. The answer shall contain nothing impertinent or irrelevant; but the defendant shall be required to plead all such matter of law and fact in the same answer as he may think proper to rely on, conformably to the rules of practice adopted by the first judicial court of the State of Louisiana prior to the adoption of the "Code of Practice;" and in all cases where matters of law and matters of fact are plead in the same answer, the pleas on points of law submitted to the court, shall be argued and determined before the issues of fact shall be submitted to the jury.

Rule 5. The clerk shall keep a docket in which all cases that are at issue shall be entered in the following order: 1. Causes in which both issues to the court and to the country are made up. 2. United States' causes of a general nature, and criminal prosecutions. 3. Jury causes, other than those of the United States. 4. Court causes, or suits to be tried by the court alone. 5. All admiralty causes, (the United States admiralty causes having precedence on the list,) and in setting the causes for trial they shall be called in the order thus prescribed.

Rule 6. All causes at issue, whether in point of law or fact, shall be called on the second day of each term at the meeting of the court, and set down for trial. In all cases in which pleas both to the court and country are made, the pleas involving matters of law, or issues submitted to the court

alone, shall be first tried; and such of them as may be directed to be tried on the issues of fact, shall be immediately transferred to the jury docket, to be tried on the merits during the same term, in the discretion of the court. All cases in which dilatory or declinatory pleas or exceptions to form are made and overruled, the party making such plea or pleas, or exceptions, shall pay to the plaintiff all costs of suits up to the time of their being decided against him; and when a plea is made to the jurisdiction of the court, involving the question of citizenship of a party, it shall be tried by a jury, and if the verdict sustains the jusrisdiction, all costs shall be paid to the plaintiff, and the cause shall be immediately tried by the same jury on its merits, at the option of the plaintiff, if by the pleading it be a jury cause, if not it shall be forthwith submitted to the court for decision.

Rule 7. If it be the intention of a party to take an issue on the fact, he must expressly pray for a jury, otherwise the cause shall be wholly tried by the court, (except cases where the law itself requires a jury,) and shall be put in the fourth class of cases on the docket.

Rule 8. When a jury is about to be sworn in a cause, each party may peremptorily set aside three of them, but no more, except for a legal cause.

Rule 9. The clerk shall enter no cause on the docket until the pleadings are fully made up, nor shall any cause be entered thereon except by the clerk or his deputy.

Rule 10. If any docketed cause shall be called at two courts and not tried, the plaintiff shall be called, and if he does not immediately go to trial he shall be *nonsuited*, unless it shall appear that it had been continued at defendant's motion, or other satisfactory cause shall be shown to the court, *on oath*, to prove it was not postponed on account of the plaintiff's neglect, or unless the defendant, at such second calling, shall obtain a further contiuance; but nothing in this rule shall be construed to prejudice defendant's right of calling for a *nonsuit*, at any previous court.

Rule 11. If a cause is at issue, and either party move for a continuance of it on account of the absence of a witness, such motion must be on oath or affirmation of the party, his agent or attorney, in writing, subscribed by him, stating that some witness, residing within the reach of the process of the court, (who shall be named and the place of his residence mentioned,) is wanting; that he believes that such witness is a material and competent witness in the cause; and, to satisfy the court of his materiality, shall state what fact or facts it is expected or believed the witness will prove on the trial; that all reasonable endeavors have been used to procure his attendance at the term; that he cannot safely go to trial without the benefit of his testimony; and that a continuance is not prayed for the purpose of delay.

If an application be made for a continuance, and also for a commission to procure evidence, (the other party not consenting thereto,) the affidavit must state what fact or facts it is believed will be proven on the trial of the cause, that the testimony sought is competent and material, that he cannot safely go to trial without the benefit of it, that he believes it can be procured in a certain time, which shall be specified, and that the application is not made for delay. If a commission issue, interrogatories must be filed, as directed in the following rule:

Rule 12. The clerk is authorized, in vacation, on the written application of the plaintiff or his attorney, to enter the discontinuance of a cause, and with consent of counsel, written, signed, and put on file, to enter on the

minutes, rules, and orders, preparatory to trial of causes pending therein, and to issue commissions to take testimony in all cases, at the instance of either party, and if it be not the intention of the party taking out the commission to take testimony *de bene esse* under the 30th section of the Judiciary Act of 1789, he shall file interrogatories and serve a copy thereof on the opposite party or counsel, who may, if he thinks proper, add cross interrogatories, and return the whole to the other within three days, or, in default thereof, the commission may be executed without the cross interrogatories.

Rule 13. No amendment shall be made to any petition or answer, unless it be made previous to setting the cause for trial, (except as to mere matters of form, which may be made at any time before trial,) and no amendment shall be made at any time, tending wholly to alter the nature of the action or defence.

Rule 14. In all rules to show cause, the party called upon shall begin and end his case; and on special matters, either springing out of a cause at issue or otherwise, the actor or party submitting a point to the court, shall in like manner begin and close: and so shall a defendant who admits the plaintiff's case and takes upon himself the burden of the proof, have the like privilege.

Rule 15. In all cases of affirmance of judgment on writs of error from judgments pronounced in this court, a rule may be taken on the principal and his sureties in the appeal bond, returnable ten days after recording the mandate of the Supreme Court, to show cause why execution should not issue against them; and, no cause being shown, judgment shall be entered against them and the principal, and execution issue accordingly.

Rule 16. Upon the return of an award or umpirage, a three day rule shall be served upon the party or his attorney, against whom the award or umpirage may be, and should the same be confirmed by the court, judgment shall thereupon be entered and execution issue in the same manner as if judgment had been obtained on verdict.

Rule 17. Every motion made for any rule or order shall be submitted to the court in writing, by the counsel who makes it, and if granted by the court, shall be delivered to the clerk to be entered on the minutes.

Rule 18. Not more than two counsel shall be permitted to argue on the same side of a cause, without leave of the court.

Rule 19. All applications for new trials shall be made within three days after the verdict of the jury, or judgment of the court, (as the case may be;) and, if no such application be made, or being made shall be overruled, judgment shall be signed, and execution issue if required.

Rule 20. Counsellors and attorneys licensed by the Supreme Court of this State, may be admitted as such in this court; but no *attorney in fact* shall be permitted to appear as an *attorney at law*, to prosecute or defend any suit.

Rule 21. After the argument of a cause upon matters of law, submitted to the court, a statement in writing of the points relied upon and a note of the authorities cited, may be required of the counsel on both sides, by the court, before giving judgment thereon.

Rule 22. In all cases where a sum certain is sworn to be due from defendant to plaintiff, special bail shall be ordered; and in all other cases, affidavit being made of the facts, the judge, (or in his absence the clerk,) shall order

the defendant to be held to bail, in such sum as he may think just; but no attorney at law shall be received as special bail.

Rule 23. The marshal shall not be bound to serve any subpœna on a witness on the day on which the cause is set for trial, wherein such witness is required, unless specially directed to do so by the court.

Rule 24. It shall be the duty of the marshal to summon juries according to law, to serve at each stated term of the court, and he, or his deputy, shall serve a written summons on each juror, expressing the day, hour, and place at which he is to appear, and also whether he is to serve as a grand or a petit juror.

Rule 25. To all the writs of *venire*, issued for summoning jurors, the marshal or his deputy shall make a return upon oath, written at length, before the clerk of the court, and in the said return shall make one class of those who were summoned personally, a second class of those for whom summonses were left at their houses, and a third class of those who could not be found.

Rule 26. The clerk shall keep a book, in which shall be entered the names of all persons who shall be summoned as jurors, and on every call of the names, shall note opposite each name the presence or absence of the juror; or, if any juror, once empannelled, shall refuse or neglect to attend punctually every morning on the call of the pannel, unless previously excused by the court, he shall be cited to show cause why he should not be fined for his default; and if he show no sufficient cause, he shall be fined, or otherwise punished, according to law.

Rule 27. All moneys paid into the court of the United States, or received by the officers thereof, in causes pending therein, shall be immediately (that is, the day after that on which they shall be received,) deposited in the Branch Bank of the United States, in the name and to the credit of said court; and that at each stated session of the court, the clerk thereof shall present an account to the court of all moneys remaining therein, subject to the order thereof, stating particularly on account of what causes said moneys are deposited, which account, with the vouchers thereof, shall be filed in court.

Rule 28. All notes and obligations, and the gross amount of moneys arising from the sale of property, in pursuance of any order or decree of this court, shall be paid into court by the marshal, to be deposited in the Branch Bank; and that an account of sales of such property, so disposed of, shall be filed in court at the same time; and that in the cases mentioned in this and the preceding rule, the costs and charges of the suit shall be taxed and first paid out of the moneys in court.

Rule 29. Money deposited in court pending a suit, shall not not be delivered on bond to any party or person.

GENERAL RULES OF PRACTICE IN ADMIRALTY.

Rule 1. The material facts stated in a libel (except in case of a libel for seamen's wages or where the United States are libellants) must be sworn to by the libellant, his agent or attorney, before an order for admiralty process shall issue, and every *claim* must be sworn to in the like manner, before filing the same.

Rule 2. When the process is *in rem*, and a party is also personally cited, the citation shall be made returnable at the same time with the warrant, to

wit, in fourteen days: and when the proceeding is altogether *in personum*, the process shall likewise be returnable in fourteen days.

Rule 3. In all cases of seizure and prosecution of any ship or vessel, goods, wares, and merchandise, when the claimant may bond of right under the 89th section of the act of second March, 1799, "to regulate the collection of duties on imports and tonnage," and in all other cases where the district attorney is consenting to such bonding, the same may be done in the manner directed by the said section, the district attorney naming the appraisers and approving the security.

Rule 4. The clerk, or in his absence, the deputy clerk, be and he is hereby appointed, a commissioner, before whom appraisers of ships or vessels, or goods, wares, and merchandise, seized for breaches of any law of the United States, may be sworn or affirmed.

Rule 5. Appraisers, acting under the orders of the court, shall be severally entitled to receive five dollars in each case wherein they may make an appraisement, to be paid by the party at whose instance the appraisement shall be made.

Rule 6. All appraisements and bonds taken in pursuance thereof shall be copied at length in a book to be kept for that purpose, and the originals filed in court.

Rule 7. No vessel or merchandise, in the custody of the marshal, shall be released upon bond, until the costs and charges of the officers of the court (so far as the same may have accrued) shall be paid by the party giving bond.

Rule 8. When property is in the hands of the marshal, he shall be authorized, from time to time, on motion to that effect, to sell so much of the same at public auction, after notice, as may be necessary to defray the costs and charges incident to the keeping of the same.

Rule 9. Moneys paid into court shall not be paid out in pursuance of any decree of the same, upon which an appeal may be had, until ten days (exclusive of Sundays) shall have elapsed after such decree shall have been made, and when an appeal shall be entered, the appellant shall, within ten days, exclusive of Sundays, from the time of making the decree, give security for damages and costs, and if security shall not be given, within that time, the decree may be executed as if there had no appeal been prayed for.

Rule 10. In proceedings touching seamen's wages, when a party is cited to show cause against the issuing of admiralty process, oath must be made of the service of such citation, in case the party cited does not appear, except the citation has been returned, as served by the marshal, or his deputy.

Rule 11. No claim shall be filed after the expiration of monition, or return day of the warrant, without the leave of the court, or by consent of the parties libellant, in writing, and put on file.

Rule 12. In all cases in which the United States are libellants, the clerk is authorized to issue admiralty process without an order from the judge.

ADDITIONAL RULES.

20th March, 1830.

1st. No denial of the allegation of citizenship made in a petition, nor any dilatory exception or plea in abatement involving matters of fact shall be allowed, unless verified by affidavit filed therewith by the counsel, agent, or party, as to their belief of the truth thereof.

14*th June*, 1830.

2d. The testimony of witnesses given at the bar, shall not be reduced to writing by the clerk of the court, or any other person in trials at law, as contradistinguished from admirality and equity causes.

3d. Facts shall not be submitted to a jury in order to obtain a special verdict in any cause, except by the consent of parties entered on record.

4th. No verbal agreements or arrangements of parties, or their counsel, touching any cause depending in this court, shall be deemed of any validity, or noticed in any way by the court.

28*th May*, 1831.

It is ordered, that the 12th rule of the rules of this court relating to suits at law, be so amended as to allow *plaintiffs* in all cases to take out commissions to examine witnesses after the return of service of process; the plaintiff's serving the defendant with a copy of his interrogatories, as heretofore required: and when defendant resides in the country, he shall be allowed, in addition to the time now prescribed, one day for every twenty miles distance he may reside from the city of New Orleans, to file cross-interrogatories; commissions on the part of *defendant* shall issue only after issue joined, and in conformity with the previous practice of this court.

A true copy from the records of the court.

DUNCAN N. HENNEN, *Clk.*

The prayer for a trial by jury was refused by the court, as well for the reason above stated, as because there were no *facts* in issue between the parties which were not determinable by the record; but in consideration of the respondent being permitted to amend the pleadings by filing an answer on the day the cause was set for trial, the court ordered it to be continued until the 28th instant, all of which proceedings are ordered to be spread on the record.

Afterwards, to wit, on the 28th day of Dec., 1833, at a stated and regular session of the said court, the following order of court was made, to wit:

SATURDAY 28*th Dec.*, 1833.

The court met, pursuant to adjournment.

Present Hon. Samuel H. Harper.

SEBASTIEN HIRIART *vs.* JEAN GASSIES BALLON. } No. 3,321.

This case came on again this day before the court for hearing, when, after hearing the evidence and arguments of counsel, the court now order, adjudge, and decree that the injunction granted in this case be and the same is hereby dissolved.

The counsel for the plaintiff objected to going into the trial at this time, on the ground that the case has not been regularly fixed.

The court overruled the objection, and ruled the plaintiff to trial for the reasons set forth in the record on the 26th instant, which decision of the court the plaintiff, by his counsel, excepts.

The plaintiff introduced in evidence a bill of sale from the marshal to Elmire Masson Ballon, and the defendant, a record of this court in the case of Jean Gassies Ballon *vs.* Pierre Gassies.

Afterwards, to wit, on the 14th day of January, A. D. 1834, into the said court came the plaintiff, Sebastien Hiriart, and by his counsel filed the following petition of appeal, to wit:

To the Hon. Samuel H. Harper, Judge of the District Court of the United States for the Eastern District of Louisiaia.

The petition of Sebastien Hiriart, respectfully shows:

That in a certain suit or proceeding in which your petitioner is plaintiff, and Jean Gassie Ballon is defendant, No. 3,321, on the files of this court, a final judgment or decree was rendered against your petitioner on the 28th Dec., 1833; that your petitioner is advised and believes that their is error to his prejudice in said judgment or decree, and that he is aggrieved by the same.

He therefore prays that he may be permitted to appeal from said judgment or decree to the Supreme Court of the United States, on giving such security as is required by law to operate as a supersedeas or stay of execution; and that the said Jean Gassie Ballon may be properly notified of this petition, and that the necessary citation may issue in the premises.

(Signed) JOHN SLIDELL, *Atty. for Petitioner.*

Assignment of Errors.

1. The application of the plaintiff for a trial by jury was improperly refused by the judge.
2. The cause was not properly fixed for trial in conformity with the laws regulating practice or the rules of court, whether the same be considered as a suit at common law or a suit in equity.
3. The answer of the defendant not having been sworn to, the allegations in the petition of the plaintiff must be taken as true and sufficient cause as therein shown, for the maintenance of the plaintiff's injunction.
4. By the return of the marshal, and by the copy of the bill of sale by said marshal, given in evidence by the plaintiff, it appears that a sum has been made on the execution levied against Pierre Gassies, for whom the plaintiff became surety, exceeding by thirteen hundred and sixty-one dollars and fifty cents, that which has been credited on said execution.

(Signed) JOHN SLIDELL, *for Petitioner.*

Endorsed—An order dissolving an injunction is not that final judgment in contemplation of law which authorizes an appeal. The application is therefore refused.

Opinion of the Court.

SEBASTIEN HIRIART
vs.
JEAN GASSIES BALLON.

In a suit between Jean Gassies Ballon and his son, Pierre Gassies, tried in this court in 1830, the jury found a verdict against the son for $3,100, on which judgment was rendered by the court. From that judgment the defendant, Pierre Gassies, appealed, having executed an appeal bond with Sebastien Hiriart as his surety.

On the trial of the case in the Supreme Court of the United States the judgment below was affirmed, and a mandate, in the usual manner, issued to

the court below commanding the judge to carry that judgment into effect. The original plaintiff took out a writ of fieri facias which was levied on certain property of the original defendant; but which, in consequence of encumbrances on it, as stated in the marshal's return, he was unable to make out of it only a small sum, which he credited on the execution, and returned it to the court.

No more property of the original defendant being found, the plaintiff, Ballon, took a rule on Hiriart, the security on the appeal bond, to show cause why he should not pay the amount of the judgment. The security appeared, and alledged for cause that judgment could not be given against him on a *rule to show cause*, but that suit in a regular way ought to be brought on the appeal bond.

This objection was overruled on two grounds. 1st. Because on the affirmance of a judgment below, the security is thereby as much bound to pay the debt as his principal; and 2. Because a rule of this court, with a view of apprizing sureties of the inablility of their principals to pay, declares that, in all cases of affirmance of judgment on writs of error, a rule may be taken on the principal, and his sureties in the appeal bond, returnable in ten days, (after recording the mandate of the Supreme Court,) to show cause why execution should not issue against them, and no cause being shown, judgment shall be entered against them, and execution issue accordingly. For these reasons the rule taken on the surety was made absolute, and judgment for the remainder of the debt, then due, was entered against him.

From this judgment no attempt was made to appeal. Afterwards a fieri facias was taken out and levied on property said to belong to the surety, Hiriart. Whereupon he applied to the judge by petition for an injunction to stay further proceedings on the execution, complaining of the irregularity of the process apparent on the face of the record. The petition was sent to the judge, then in the country, where he had no opportunity of comparing the allegations contained in it, with the record, and these allegations having been made on oath, the injunction was granted; but when the cause was set down for trial, the record contradicted the allegations of the petitioner, and the injunction was dissolved.

From which order, dissolving the injunction, the complainant has prayed an appeal to the Supreme Court of the United States, which is refused, and the reasons for such refusal, at the request of the counsel for the complainant, I proceed to state in writing.

The act of Congress forbids any writ of error or appeal to be taken, except from a *final* judgment. The Supreme Court of the United States in the case of Western et al. *vs.* the City Council of Charleston, (2 Peters, 449,) have given a judicial definition of this word "final." It is there said "the word final must be understood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause." That is, as I understand it, only such judgments as conclude the *rights* of the party can be considered final in the sense of the law.

In the case under consideration, the rights of the party complainant as to his liability to pay this debt, (for that was his own stipulation in case the principal did not,) were passed upon at the time the judgment below was affirmed, and at all events, when judgment was given against him on the rule to show cause as above referred to, then perhaps he might have defeated the obligation by the plea "non est factum" or some other; but the dispute

now is merely as to the remedy sought to enforce a right already determined by both courts.

In the case of Young *vs.* Grundy, (6 Cranch, 51,) it is said "an appeal does not lie from an interlocutory decree dissolving an injunction." And in Gibbons *vs.* Ogden, (6 Wheaton, 448,) the court say, "nor from a decree affirming a decretal order of an inferior court refusing to dissolve an injunction."

I am aware that the technical expression, "interlocutory judgment," is usually applied to *incidental orders*, made in the *progress* of a cause, not affecting the main question to be afterwards determined by the court; but all incidental orders are "interlocutory," whether they be made pending or after the determination of the main question, and these orders may be made so long as the case is within the control of the court, and all cases are within the control of the court until its judgment is fully executed. When an injunction is obtained suspending an execution, the object is not to bring the judgment itself into review, but to inquire whether an improper attempt is made to enforce it.

Injunctions are grantable at *chambers*. Now it will not be pretended that a verbal refusal of a judge to grant an injunction would sustain an appeal; but if he should, through inadvertence, grant it, when no equity appeared on the face of the petition, or on further examination it should be found to *be found* unfounded, and he should then refuse to perpetuate it, what difference is there in reason, why a refusal to make it operative, after a full investagation of its merits should give the party any more right to appeal, than his refusal in the first instance?

It may be said that when a dispute arises as to the right of a party to appeal, the case ought to be sent up to the appellate court for its determination as to that right. To this, then, are two answers: 1. Where the law itself has fixed the amount from which an appeal can be taken, and that amount is palpably below the sum so fixed; or when the appellate court has given a construction to the law embracing the right of a party to appeal, in a given case, as I conceive has been done in cases similar to this, it would be treating the court with disrespect to send to it a case, of which, according to settled law, it could not take cognizance.

2d. However much I am disposed to have my decisions reviewed, yet I am as much bound to guard the rights of one party, as the other; and when my judgment is convinced that the law does not authorize an appeal, and which if granted would operate injuriously to the other party, I feel bound to refuse it. Besides if this party has a right to appeal upon the ground stated, his security in the appeal bond, in case of his insolvency, would have the same right, on making a sufficient oath, to abtain an injunction, and so on *ad infinitum*.

Resting this refusal on the law of the case, I forbear to mention circumstances which occurred on the hearing of this matter, tending to satisfy my mind that more delay is the object of this application; and I also omit to mention the remedy at *law*, which may be had against the marshal, if in any thing he has proceeded illegally.

On the trial of this case the following copy of a bill of sale, from the marshal to Madame Elmire Marson Ballon, on the records in the clerk's office of the said court, was introduced in evidence by the plaintiff; and is in the words following, to wit:

Whereas I, Abel Waddell, deputy marshal, in and for the eastern dis-

trict of Louisiana, by virtue of an alias fieri facias writ, to me directed, from the honorable the United States court in and for the eastern district as aforesaid, against the goods and chattles, lands and salves, of Pierre Gassie, at the suit of Jean Gassie Ballon *vs.* Pierre Gassie, No. 2,729 of said court, did seize the following property, to wit, a tract of land situated in the parish of West Baton Rouge, eight miles, the coast of said parish fronting ⅝ths of an arpent on the river Mississippi; bounded above by lands of , and below by lands of Madame widow Frances White, and running back the usual depth of forty arpens, being the residence of said Pierre Gassie, with all the buildings and improvements thereon; also one undivided half of a double concession, measuring five arpens front, on the back or closing lines of Madame White, with the depth of forty arpens, and an opening of five degrees of the side lines held in copartnership with the said Madame Francès White; also a negro man named Charles, of 35 years of age; and having exposed the same to sale according to law, subject to the following mortgage, to wit, "a tacit mortgage in favor Madame Elmire Marson, wife of Pierre Gassie, for the sum of thirteen hundred and ninety-six dollars," as appears by the certificate of the recorder of mortgages, in and for the parish aforesaid, Madame Elmire Marson, wife of the said Pierre Gassie, as aforesaid, became the purchaser thereof, for the price of seventeen hundred and thirty-eight dollars and fifty cents, for which, to deduct the foregoing mortgage of thirteen hundred and ninety-six dollars, leaves an excess of three hundred thirty-two dollars and fifty cents, cash which I hereby acknowledged to have received.

Now, therefore, I, Abel Waddell, deputy as aforesaid, do in consideration of the premises, and by virtue of the laws in such cases made and provided, grant, bargain, and sell, set over and assign, to the said Elmire Marson, wife of Pierre Gassie, her *her* heirs and assigns, all the right, title, interest, and claim, of the said Pierre Gassie, in deed, to the above described lands, and slave Charles, and all the right, title, interest, and claim, which he, the said Pierre Gassie, had in or to the same, on the 1st day of December, A. D. 1829, or at any time since, to have and to hold the said above described lands, and slave Charles, to the said Elmire Marson, wife of Pierre Gassie, as aforesaid, her heirs and assigns for ever.

In testimony whereof I have set my hand and seal, this 31st day of January, in the year A. D. 1833, and of the Independence of the United States of America the 57th.

(Signed) ABEL WADDELL, *Dept. Marshal.*

Signed, sealed, and delivered in presence of
M. Patterson,
J. M. Elam.

Recorded this 20th February, 1833.

Upon the trial of the case the following record in the case of Jean Gassies Ballon *vs.* Pierre Gassie, was introduced in evidence by the defendant, and is in the words and figures following, to wit:

Petition.

To the Hon. the District Court of the United States for the Eastern District of Louisiana.

The petition of Jean Gassies Ballon, a resident of the city of Barsac, in France, and now in the parish of West Baton Rouge, humbly showeth:

That your petitioner is a French citizen of the kingdom of France, where he intends to return as soon as the settlement of the affairs which caused him to return to this State shall be terminated.

Your petitioner further says that sometime before the year 1819, he was settled as a merchant in the city of New Orleans, where he was trading on wines, which he did receive from Bordeaux, in France, to a very considerable amount.

That some time in the said year 1819, your petitioner having become blind, he determined to go to France, in order to find the means to recover his sight if it was possible, and did deliver all the property he left in this city and State, to the care and administration of Pierre Gassies, his son, who is now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen, which property was worth at least $2,400, and consisted in wines either in casks or cases, in provisions, vinegar, and other articles, and in a large pirogue which your petitioner had just purchased for the sum of $400, by an act executed before Christoval de Armas, then notary public of this city, in order to trade on the coast.

That your petitioner also delivered to his son, the said Pierre Gassies, several accounts amounting altogether to a sum of $468, which were due to him by sundry persons residing on the coast from New Orleans up to Baton Rouge, for several articles of merchandise sold to them for your petitioner, account by Arnaud Gassie, his deceased son, in order that Pierre Gassie might recover the same.

That when arrived in France your petitioner did pay to the discharge of Pierre Gassies, his son, two debts due by him at Bordeaux, to wit: One of $94, to one J. Guichon, and the other to one B. Pakas of $10 08.

That some time before the month of November, 1823, your petitioner did send to the said Pierre Gassies in order to be sold for his own account sixteen casks of wine and one case of 12 bottles of white wine, the purchase price of which amounted to the net sum of $263 50, which the said Pierre Gassies did receive on the 10th November, 1823, by the brig Casket, from Bordeaux, Tracy, master.

That your petitioner had thus left to his son, Pierre Gassies, the administration of all his affairs in this State, under an express, though a verbal, promise on the part of his, that he should pay to him annually a sum of $600 French livres, or $120 of our money until the said Pierre Gassies should come in France, and render to your petitioner an account of the proceeds of the merchandise he had left or sent to him to sell, and of the debts and credits he had recovered for him.

But that the said Pierre Gassies, forgetting what his father had made for him, never rendered to him any account of the property your petitioner had left in his hands, or of the proceeds thereof, which conduct compelled your petitioner to return to this State, which he did some time in the year 1828. That on his arrival in this country your petitioner, supposing that he would find his son more reasonable and just towards him, and that he would at last render to him the account he had the right to exact from him, was induced to deliver him, in order to sell for his own account, two casks of wine out of three he had brought to this country, and which two casks of wine were worth at least the sum of $61 50.

And whereas all the articles for which the said Pierre Gassies is accountable, amount altogether to a sum of $3,297 08, as appears by the account annexed to this petition.

And whereas the said Pierre Gassies did refuse, and still now refuses to account for the same, though often requested to do so, saying that he was not indebted to your petitioner in any thing, all which matters your petitioner humbly prays to be inquired into by a jury of this country.

Your petitioner humbly prays your honorable court to order that the necessary process shall be issued in order to cite the said Pierre Gassies, residing in the parish of West Baton Rouge, to appear before this honorable court, in order to answer to this petition, and then to be condemned to pay your to petitioner, with interest and costs, the said sum of three thousand two hundred and ninety-seven dollars and eight cents.

And your petitioner further prays that such and other relief may be granted to him as the nature of the case may require.

And as in duty bound, &c.

(Signed) MOREAU LISLET & SOULE,
Of Counsel for Petitr.

Account annexed to Plaintiff's petition.

PIERRE GASSIE, junr.,

To Jean Gassies Ballon, senr., Dr.

1819, September 6th.	For the value of sundry goods and merchandise which Jean Gassies Ballon delivered to Pierre Gassies, his son, to sell for his account - -	$2,400 00
Do. do. do.	For the amount of several claims and credits which were due to him for merchandise, sold on the coast from New Orleans up to Baton Rouge, and the accounts thereof he did deliver to him to recover for his account - -	468 00
1822, August 22d.	For so much Jean Gassie Ballon did pay to J. Guichon, in Bordeaux, France, for so much due to the said Guichon by the said Pierre Gassies, 470 French livers, 25 cents., making in dolls. -	94 00
Do. do. 29th.	For so much paid by Jean Gassies Ballon, at Bordeaux, by one B. Pakas, for so much due to him by the said Pierre Gassies, junr., 54 French livres, 16 cents., making ten dollars - -	10 08
1823, December 10.	For the purchase price of 16 casks of wine, and one case of 12 bottles of white wine, delivered to Pierre Gassies, junr., by Jean Gassies Ballon, his father, to be sold for the account of the latter, and imported to New Orleans, by the brig Casket, Tracy, master, from Bordeaux	263 50
1828, March 13th.	For the purchase price of two casks of wine which Jean Gassie Ballon delivered to his son, Pierre Gassies, to be sold for his account - - -	61 50
		$3,297 08

PIERRE GASSIE, jeune, *Dort.*

à Jean Gassie Ballon, pere.

1819, Sepr. 6th.	Pour la valeur diverses marchandises et effets que Jean Gassie Ballon a laissa à Pierre Gassies, son fils, pour vendre pour son compte - -	$2,400 00
,, ,,	Pour le montant de plusieurs créances que lui elacent du pour marchandises, vendeur à la côte depuis la Nouvelle Orléans jusqu'à Baton Rouge, et dont il lui aremis les comptes pour en faire les recouvremens pour lui - - - -	468 00
1822, Aout 22d.	Pour autant paye par Jean Gassie Ballon à J. Guichon, à Bordeaux, en France, pour autant du ace. dernier par le dit Pierre Gassies, 470 livres, 25 centimes, faisant en piastres - - -	94 00
1822, Aout 29.	Pour autant paye par Jean Gassie Ballon, à Bordeaux à B. Pakas, pour autant que lui devait le dit Pierre Gassies, je., 54 livres, 16 centimes, faisant en piastres -	10 08
1823, Nov. 10.	Pour le prit d'achat de 16 brqs. de vin et d'une caisse de 12 bouteilles vin blanc remises à Pierre Gassies, je., par Jean Gassies Ballon, son pere, pour être vendu pour le compte de ce dernier, et importer à la Nouvelle Orléans, par le brick Casket, Capt. Tracy, de Bordeaux -	263 50
1828, Mars 13.	Pour le prix d'achat de deux barriques de vin que Jean Gassies Ballon à remises à son fils, Pierre Gassie, pour vendre pour son compte - - -	61 50
		$3,297 08

Petition in French.

A l'honorable Cour de District des Etats-Unis pour le District de l'Est de la Louisiane.

Petition de Jean Gassies Ballon, residant en Barsac, en France, et actuellement à West Baton Rouge, a l'honneur de vos exposer:

Que votre petitionaire est citoyen francais est n'est ici que temporairement avec le dessein de retourner en France, aussitôt qu'il a termine les affaires qui l'ont améne à la Louisiane.

Qu'en l'année 1819 il etait alors etabli à la Nouvelle Orléans, oú il fesait un commerce advantageux de Tonnelene, et en vins qu'il recevait de France.

Qu'ayant été frappé de cecite à cette epoque et desirant aller en France, pour s'assurait s'il ne pouvait trouver quelque moyen de recouvrir la vue il confia à son fils, Pierre Gassies, residant aujourd'hui dans la paroisse d'ouest Baton Rouge, oú il s'est fait naturalizé citoyen Americain, le fond de magasin qu'il possedait à la Nouvelle Orléans, et qui contenait pour $2,400,

de marchandises consistant en vins, en caisse et en barriques, et d'autre liquers, comestibles, et autres articles, en y comprenant une pirogue neuve, qu'il venait d'acheter $400, par acte auparavant Christoval de Armas, lors notaire en cette ville.

Que votre petitionaire confia en outre à son dit fils, Pierre Gassies, pour $468, de recouvremens à faire pour marchandises que son fils aineé, Arnaud Gassie, alors decedée, avait vendues pour le compte de lui petitionaire à divers habitans residant sus la côte depuis la Nouvelle Orléans jusqu'à Baton Rouge.

Que depuis et dans le mois d'Aout, 1822, votre petitionaire paya pour le compte de son fils, deux dettes dont de dernier etait débiteur à Bordeaux, savoir l'une de $94, en faveur d'un Sieur J. Guichon, et l'autre de $10 08, en faveur d'une Sr. B. Pakas.

Que dans le mois de Novembre, 1823, on anterieurement votre petitionaire envoya à son dit fils, Pierre Gassies, seize barriques de vin et une caisse de 12 bouteilles de vin blanc, dont le prix d'achat s'elevait à la somme $263 50, pour être vendues pour le compte de lui petitionaire lesquel le dit Pierre Gassies, reçut par le brick Casket, de Bordeaux, Capitain Tracy.

Que votre petitionaire avait remis ainsi la soin de toutes ses affaires à son fils, Pierre Gassies, sous l'obligation verbale que ce dernier avoit prise de lui faire passer annuellement 600 francs, ou $120 de notre monnaie, jusqu'a ce que son dit fils, peut revenir en France, pour lui rendre compte des marchandises qu'ils laissaient ainsi entre ses mains.

Que le dit Sieur Pierre Gassies, peu reconnaissant de ce que votre petitionaire avait fait pour lui ne lui ayant rendu aucun compte des valeurs que son pere, avaient ainsi laisses entre ses mains obligeé ce dernier à revenir à la Nouvelle Orleans, qui dans la confiance qu'il lui rendait enfin de compte lui delivra encore deux barriques de vin sur trois qu'il avait apportes avec lui le prit d'achat desquelles, deux barriques s'elevait à la somme de $61 50.

Et attendu que le montant de tous les articles dont le Sieur Pierre Gassies, est comptable envers votre petitionarie s'elevent à une somme de $3,297 08, ainsi qu'il resultent dú compte annexe à la presente petition, et que le dit Sieur Pierre Gassie se refusent à rendre aucune compte à son pere endisant qu'il ne lui dort rien; tous lequels faits votre petitionaire demande à être soumis à une jury.

Votre petitionaire prie votre honorable cour de lui accorder les ordres necessaires pour citer à comparaître pardevant vous le dit Sieur Pierre Gassie, demeurant dans la paroisse d'ouest Baton Rouge, pour avoir à reponare à la presente petition, & s'entendre condamner à payer votre petitionaire avec interets et depens la dite somme de $3,297 08.

Votre petitionare demande que tel autre jugement sort rendue que la nature du cas peut requerirent.

(Signé) MOREAU LESLET & SOULE,
Avocat du Petitionaire.

Citation in French and English.

The President of the United States of America to the Marshal of the Eastern District of Louisiana, or to his lawful Deputy, GREETING:

You are hereby commanded to cite Pierre Gassies, so that he be and appear at the district court of the United States, for the eastern district of Louisiana, to be holden in the city of New Orleans, on the second Monday

of December, 1829, to answer to the complaint of Jean Gassies Ballon; and that he do file his defence, or answer, with the clerk of said court on or before the same, or judgment will be given against him by default: and have you then and there this writ.

Witness the hon. Samuel H. Harper, judge of said court, at the city of New Orleans, this 18th day of November, 1829, and 54th year of the Independence of the United States.
[SEAL.]
(Signed) F. W. LEA, *Clk.*

Le President des Etats-Unis d'Amerique au Maréchal du District Oriental de la Louisiane, ou a son Deputé dument autorisé, SALUT:

Vous etes commandes de citer Pierre Gassies, pour qu'il ait à comparaître à la cour de district des Etats-Unis, pour le district oriental de la Louisiane, que siégera dans la ville de la Nouville Orléans, le 2me Lundi de Decembre, 1829, à l'effet de repondre à la plainte de Jean Gassies Ballon, et d'y remettre résponse ou défense au greffier de la dite cour, avant ou le même jour, faute de quoi, jugement par defaut sera rendu contre lui; et vous ferez votre rapport de cette ordre.

Temoin l'honorable Samuel H. Harper, juge de la dite cour à la ville de la Nouvelle Orléans, ce 18me jour de Novembre, 1829, et la 54ieme année de l'Independence des Etats-Unis.

(Signé) F. W. LEA, *Greffier.*

Marshal's Return—Dec. 1st, 1829.

I hereby certify that I have this day served a copy of the within citation, together with a copy, duly certified, of petition, on Pierre Gassies, in person, at his domicil, in conformity to law.

(Signed) JAMES W. WIKOFF,
Dept. Marshal, East Dist. La.

Returned into court on the 5th Dec., 1829.
(Signed) D. F. BURLINGAME, *Dept. Marshal.*

Answer.

JEAN GASSIES BALLON
vs.
PIERRE GASSIES.

The defendant for plea and exception to the petition of the plaintiff, in the above cause, says, and gives the court to understand and be informed, that there is no sufficient cause of action in the plaintiff's petition contained.

Wherefore he prays to be hence dismissed, with his costs in this behalf expended.

And for answer to the said petition decrees all and singular the allegations therein contained, and prays that the same may be inquired of by the country, &c., &c., &c.,

(Signed) GEORGE EUSTES, *for Defendant.*

Endorsed—Filed by leave of the court, this 26th Dec., 1829.
(Signed) F. W. LEA, *Clk.*

Judgment.

THURSDAY, 25*th February*, 1830.

The court met, pursuant to adjournment.
Present honorable Samuel H. Harper.

JEAN GASSIE BALLON
vs.
PIERRE GASSIE. } No. 2,729.

On this day came the plaintiff, by his attorney, the defendant not appearing either in person or by counsel, and thereupon came a jury, to wit, Antoine Hebrard, Jean Naba, D. Monroe, A. Rasch, Andrew Hodge, junr., Wm. G. Hewes, Patrick Thompson, Benjamin Hart, Victor David, Jonathan Davis, W. W. Caldwell, and Noah Merritt, who were sworn well and truly to try the issue joined between the parties, and who, after hearing the evidence and arguments of counsel, retired to consider of their verdict, and soon after returned the following verdict, to wit: "The jury find a verdict for the plaintiff for three thousand one hundred dollars, with interest. Wm. G. Hewes, foreman. New Orleans, February 25th, 1830."

Whereupon it is considered by the court that judgment be entered up in favor of the plaintiff against the defendant for the sum of three thousand and one hundred dollars, with interest, at the rate of five per cent. per annum, from the date of judicial demand, to wit, from the 1st day of Dec., 1829, until paid, and costs of suit.

Judgment signed March 3d, 1830.

(Signed) SAMUEL H. HARPER, *Judge U. S.*

Documents introduced in Evidence on the Trial by the Plaintiff.

NOUVELLE ORLEANS, *le* 1*st Juillet*, 1829.

Je soussigne certifie d'avoir fourni sous la date due 1r Mai, 1822, une traite à l'ordre de Monsieur Pierre Gassies, payable à soixante jours de vue sur Messrs. Philloppon du Havre, pour la somme de *f.* 13,209, cy treize mille deux cent neuf francs.

Je certifie de plus d'avoir charge pour compte du dit Pierre Gassies, sous la date du 16 Mai, 1822, 21 balles cy vingt une balles coton marques P G, No. 7 à 21, sous navire New York packet, Capt. Durnaby, en destination pour le Havre, sous lesquels coton je lui avance *f.* 4,916 90, cy quatre mille neuf cent seize francs $\frac{90}{100}$.

(Signé) MILLADDON.

Endorsed—Filed 25th February, 1830.

(Signed) F. W. LEA, *Clk.*

Letter from Pierre Gassies to Jean Gassies Ballon, his father.

NOUVELLE ORLEANS, *le* 2 *Mars*, 1824.

Mon chere pere et ma chere mere, je profite d'une occasion par Mr. Etienne Larriere qui passe en France, dont il se charge de venir te voir dont je lui ai remis deux monchoirs de madras, pour remettre à mes deux sœurs comme tu m'avais marque sur la lettre que tu me marques en question de merin que tu parle que ce serait une bonne speculatione.

Mais le merin n'est plus du même prix que quand tu etais à la Nouvelle

Orléans. Il a beaucoup argumenté et tu marques de ne payer que dix gourdes par millier. Le prix est de $25 le millier, encore on ne trouvent par de batiment pour en charger d'autant plus dans ce moment si c'est impossible *si c'est impossible* à moi de rien envoyer vu que j'etais deje marque que *j'avais vendu le vin payable à l'annee prochaine.*

Le dernier je l'ai vendu à plus de $10, de perte bar barriques; tu dois avoir recu que je te marquais de ni point envoyer de vin ni de
car les affaires vont si mal qu'il ne vaut pas la peine d'en acheter une barrique la veille d'ecrire la lettre à l'encan qu'il selait vendu au magasin à $40, je te paye $23 à l'encan.

Rien autre chose pour le present bien des compliments de la part de mon couisin à son pere et à son mere, ainsi que de ma part à tous ce qui s'enformeroit de moi.

Je finis en embraçant à toute la famille su profond de mon cœur. Ne mariques pas d'evrire toutes les occasions, ce me fait beaucoup de plaisir.

Je suis pour la vie votre bon fils.

(Signé) PIERRE GASSIES.

L'addresse de la lettre.—A Monsieur Gassies Ballon, à Barsac, departement de Gironde, passant par Bordeaux.

Entry of Merchandise imported by J. Anglade in the Brig Casket, whereof Tracy is Master, from Bordeaux on the 10th day of November, 1823.

Marks.	Packages and Contents.			Total amt. of Invoice.
P G	10 casks of wine -	847 gs.	$260	
	1 case of 12 bottles of white wine -	2 "	350	
	13th November, 1823. (Signed) J. ANGLADE.			
	Claret in casks 847 gls. at 15½ -			- - 127 15
	Claret in bottles 2 " at 30 - -			- - " 60
	Bottles 0-1 0 at 144 - - -			- - " 12
				127 77

COLLECTOR'S OFFICE, NEW ORLEANS, 11*th Nov.*, 1829.

I, Martin Gordon, collector of the customs for the district of Mississippi, do hereby certify that the foregoing entry is a true and faithful copy from the original now on file in the office of the collector of the port of New Orleans.

Given under my hand and seal of office at the city of New Orleans, on the day and year above written.

(Signed) MARTIN GORDON, *Collector.*

Petition for Writ of Error.

To the honorable the District Court of the United States in and for the Eastern District of Louisiana.

The petition of Pierre Gassie, respectfully showeth:

That your petitioner is advised that there is error in the judgment of your honorable court, in the suit wherein Jean Gassies Ballon is plaintiff, and your petitioner is the defendant.

Wherefore your petitioner prays that a writ of error, in said cause, to the Supreme Court of the United States, on his giving security in sum *sum* as your honor will be pleased to fix, and he offers as his surety Sebastien Hiriart.

And as in duty bound, &c., &c.

(Signed) EUSTES, *for Petitioner.*

Judge's Order.

Let the prayer of the petitioner be granted, on his entering into bond, with Sebastien Hiriart as his security, in the sum of four thousand five hundred dollars, provided the bond be given within the time prescribed by law.

(Signed) SAMUEL H. HARPER, *Judge U. S.*

Endorsed—Filed 8th March, 1830.

(Signed) F. W. LEA, *Clk.*

Appeal Bond..

Know all men by these presents, that we, Pierre Gassies, as principal, and Sebastien Hiriart, as security, are held and firmly bound unto Jean Gassies Ballon in the just and full sum of four thousand five hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at Donaldsonville, this 10th day of March, one thousand eight hundred and thirty.

Whereas the above bounden Pierre Gassies has this day filed a petition, praying that a writ of error may be allowed to him from a certain final judgment rendered against him in the suit of Jean Gassies Ballon *vs.* Pierre Gassies, in the district court of the United States in and for the eastern district of Louisiana, on the 3d day of the present month of March, 1830.

And the condition of the obligation is such that if the above bounden Pierre Gassies shall prosecute his said writ of error to effect in the Supreme Court of the United States, and shall pay and satisfy whatever judgment may be there rendered against him by the Supreme Court of the United States in the premises, then, and in that case, the above obligation is to be null and void, else to be and remain in full force and virtue.

PIERRE GASSIE. [SEAL.]
HIRIART. [SEAL.]

Signed, sealed, and delivered in the presence of
P. A. ROST,
CHENEVERT.

Endorsed—Filed 11th March, 1830.

(Signed) F. W. LEA, *Clk.*

Mandate of the Supreme Court.

The President of the United States of America to the honorable the Judge of the District Court of the United States for the District of East Louisiana.

Whereas lately in the district court of the United States for the district of East Louisiana, before you, in a cause wherein Jean Gassies Ballon was plaintiff, and Pierre Gassies was defendant, the judgment of the said district court was in the following words, viz., "whereupon it is considered by the court that judgment be entered up in favor of the plaintiff against the defendant for the sum of three thousand one hundred dollars, with interest, at the rate of five per cent. per annum, from the date of judicial demand, to wit, from the 1st day of Dec., 1829, till paid, and costs of suit," as by inspection of *of* the transcript of the record of the said district court, which was brought into the Supreme Court of the United States, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of January, in the year of our Lord 1832, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; on consideration whereof it is adjudged and ordered that the judgment of the said district court, in this case, be and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

March 15th, 1832.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the honorable John Marshall, chief justice of said *said* Supreme Court, the second Monday in January, in the year of our Lord 1832.

(Signed) WM. THOMAS CARROLL,
Clk. S. C. U. S.

Fieri Facias.

DISTRICT COURT OF THE UNITED STATES, *In and for the East. Dist. of Louisiana.*

The President of the United States to the Marshal of the Eastern District of Louisiana, or to his lawful Deputy, GREETING:

You are hereby commanded that you demand from Pierre Gassie the sum of $3,100, interest five per cent. per annum, from the 1st Dec., 1829, till paid, and damages at the rate of six per cent. per annum, March 15th, 1832, and the costs of suit, cash which Jean Gassies Ballon lately recovered by judgment of the district court of the United States, for the said district; and if he shall not pay the same in three days after demand, that then you cause the same to be made out of the personal estate of said Pierre Gassie, except slaves, in your district, if sufficient personal estate, exclusive of slaves, can be found therein: but if sufficient personal estate of said Pierre Gassies, exclusive of slaves, cannot be found in your district, that then you cause the same to be made out of the real estate and slaves of the said Pierre Gassies in your district, whereof he was owner on the 1st day of Dec., 1829, into

whose hands soever the same may have come. And that you have those moneys before our said court to render to the said Jean Gassies Ballon for the judgment aforesaid, on the second Monday of December next, together with this writ.

[SEAL.] Witness the honorable Samuel H. Harper, judge of said court, this 13th day of June, 1832.

(Signed) B. B. WALLER, *Dept. Clk.*

Marshal's Return.

Executed by levying on two tracts of land and some household furniture, as per accompanying appraisement; further proceedings stayed by injunction from fourth district court, parish of West Baton Rouge, State of Louisiana.

(Signed) A. WADDELL, *Dept. Marshal.*

Returned into court Dec. 10th, 1832.

(Signed) L. C. BACON, *Dept. Marshal.*

Appraisement referred to in Marshal's Return.

JEAN GASSIES BALLON } No. 2,729.
vs. } *Dist. Court of the U. S., East. Dist. of Louisiana.*
PIERRE GASSIES. }

We, the undersigned, having been duly appointed appraisers and sworn, according to law, to value and appraise the following property surrended by the defendant, to wit, a tract of land on which the defendant now resides, measuring ⅞ths of an arpent front, on the river Mississippi, in the parish of West Baton Rouge, and running back 40 arpens, which land we do appraise to be worth the sum of - - - - - $800 00

One other tract of land bought by the said P. Gassie in copartnership with the widow Frances White, being a double concession, measuring four and a half arpens on the front of the back part of said widow Frances White's plantation, and running back 40 arpens, with an opening of two and a half degrees W., appraised to be worth - - - - - - $70 00

The personal property, to wit, one secretary, worth - -	6 00
One clothes press, worth - - - -	20 00
One stone water jar with three ads. - - - -	3 00
Two small tables, worth - - - - -	8 00
Six windsor chairs, worth - - - - -	6 00
One mahogany bedstead, worth - - - - -	7 00
	$920 00

Making the sum of nine hundred and twenty dollars.

(Signed) JEAN MAILLAR, *Demoneuaux.*

Sworn to and subscribed before me, one of the justices of the peace in and for the parish of West Baton Rouge, State of Louisiana, the 23d day of July, 1832.

(Signed) THOMAS AILLET, *Juge de Paix.*

Alias Fi. Fa.

DISTRICT COURT OF THE UNITED STATES, *In and for the East. Dist. of Louisiana.*

The President of the United States to the Marshal of the Eastern District of Louisiana, or his lawful Deputy, GREETING:

You are hereby commanded that you demand from Pierre Gassies the sum of $3,100, with interest at five per centum per annum till paid, from 1st Dec., 1829, and six per cent. damages from March 15th, 1832, until paid, cash which Jean Gassies Ballon lately recovered by judgment of the district court of the United States for the said district, and if he shall not pay the same in three days after demand, that then you cause the same to be made out of the personal estate of the said Pierre Gassies, except slaves, in your district, if sufficient personal estate, exclusive of slaves, can be found therein: but if sufficient personal estate of said Pierre Gassies, exclusive of slaves, cannot be found in your district, that then you cause the sum to be made out of the real estate and slaves of the said Pierre Gassies, in your district, whereof he was owner on the 1st day of Dec., 1829, into whose hands soever the same may have come.

And that you have those moneys before our said court to render to the said Jean Gassies Ballon for the judgment aforesaid, on the third Monday of February, 1833, together with this writ.

Witness the honorable Samuel H. Harper, judge of said court, this 15th day of December, 1832.

(Signed) F. W. LEA, *Clk.*

Marshal's Return.

By virtue of the within writ I have seized the following property, to wit, a tract or parrellel of land, on which the defendant now resides, situated in the parish of West Baton Rouge, about eight miles below the court-house of said parish, measuring five-eights of an arpent front on the river Mississippi, with the usual depth of forty arpens, bounded below by *by* lands of Madame Frances White, together with all the buildings and improvements thereon.

Also the undivided half a tract of land owned in common with Madame Frances White, being a double concession, situated at the depth of forty arpens from the river, at or on the back or closing lines of Madame White, measuring five arpens front, with the usual depth, and opening of five degrees on the said lines.

Also a negro man named Charles, 34 years of age, a bureau, armoir, small table, and a wooden clock, sold subject to a mortgage in favor of Elmire Marson, for the sum of thirteen hundred and ninety-six dollars. After advertisement and appraisement according to law, the tract of five-eighths, and residence as above, was adjudicated to Madame Elmire Marson for the sum of seven hundred and forty dollars cash, and the undivided half of five arpens of the double concession as above adjudicated to Madame Elmire Marson for the sum of three hundred and thirty-three dollars and fifty cents cash, and the negro man Charles was also adjudicated to Madame Elmire Marson for the sum of six hundred and fifty-five dollars cash, making together the sum of seventeen hundred and twenty-eight dollars and fifty cents, leaving the sum of three hundred and thirty-two dollars and fifty

cents of excess, after deducting the mortgage in favor of Madame Elmire Marson, the same being for more than two-thirds of the appraisement of said lands and slave. The bureau was adjudicated to H. Landry for seven dollars and fifty cents cash, the armoir adjudicated to H. Broussard for the sum of twenty dollars and fifty cents cash, the wooden clock for thirteen dollars and fifty cents cash, the small table adjudicated to Madame Elmire Marson for one dollar and fifty cents cash, being more than the two-thirds of the said personal property, making together the sum of forty-three dollars cash, for personal property, making altogether the sum of three hundred and seventy-five dollars and fifty cents, to be credited on this writ, this 31st January, 1833.

$375 50

(Signed) ABEL WADDELL, *Dept. Marshal.*

Rule on the Surety Hiriart, and Return.

SPECIAL COURT. APRIL 13*th*, 1833.

Present honorable Samuel H. Harper.

JEAN GASSIES BALLON
vs.
PIERRE GASSIE. } No. 2,729.

On motion of P. Soule, counsel for the plaintiff, Jean Gassies Ballon, and on exhibiting to the court the mandate of the Supreme Court, affirming the decision of this court, it is ordered that Sebastien Hiriart, the security on the appeal bond in this case, show cause on the first day of the next term of this court, (being the third Monday of May, 1833,) why judgment should not be entered up against him for the amount of the judgment, damages, interest, and costs in this case, and execution issue for the same.

An extract from the minutes.

(Signed) B. B. WALLER, *Dept. Clk.*

Marshal's Return—Received 13*th April*, 1833.

Executed by delivering a copy of the within order, in the absence of Mr. Hiriart, to his daughter, a lady apparently of the age of eighteen years, being then and there at the usual place of residence of the said Hiriart, this 18th April, 1833.

(Signed) A. WADDELL, *Dept. Marshal.*

Returned 7th May, 1833.

(Signed) JOHN NICHOLSON, *U. S. Marshal.*

Answer of Sebastien Hiriart to the rule, filed by leave of court on the 21*st May*, 1833.

JEAN GASSIES BALLON
vs.
PIERRE GASSIES. }

Sebastien Hiriart, in answer to the rule taken upon him to show cause why judgment should not be rendered against him as surety on the appeal bond, with the defendant, for the amount of judgment, damages, interest, and costs in this case.

For cause, says that this proceeding is irregular; that if he be liable as surety on the appeal bond, given by the defendant, his liability must be established by an ordinary action before a competent tribunal; and that this court cannot entertain jurisdiction of the same.

And for further cause, he shows that there is no evidence of the want of sufficient property of the defendant to satisfy the demand of the plaintiff; and that until such insufficiency be legally shown, he is no manner responsible to the plaintiff in the bond aforesaid.

(Signed) JOHN SLIDELL,
Att'y for S. Hiriart.

Order of Court.

SATURDAY, *25th May*, 1833.

Present hon. Samuel H. Harper.

JEAN GASSIES BALLON
vs. } 2,729.
PIERRE GASSIES.

On motion of the plaintiff by his counsel, it is ordered that this cause be set for hearing on the rule, returnable on the first day of the term, and the claim thereto filed for Tuesday next, at 10 o'clock, A. M.

Order of Court.

TUESDAY, *May 28th*, 1833.

The court met, pursuant to adjournment.
Present hon. Saml. H. Harper.

JEAN GASSIES BALLON
vs. } 2,729.
PIERRE GASSIES.

This cause having been set by the order of the court for hearing upon the rule taken upon the security in the appeal bond, and the answer by him thereto filed, was called, argued by counsel, and submitted to the court for decision thereon.

Order of Court—Rule made Absolute.

SATURDAY, *June 1st*, 1833.

The court met, pursuant to adjournment.
Present hon. Samuel H. Harper.

JEAN GASSIES BALLON
vs. } No. 2,729.
PIERRE GASSIE.

The court having maturely considered this case, now order that judgment be entered up in favor of the plaintiff against Sebastien Hiriart, the security of the defendant on the appeal bond, for the sum of four thousand five hundred dollars, the amount of the appeal bond to be discharged by the payment of three thousand and one hundred dollars, being the amount of the original judgment, with interest, costs, and damages, according to the mandate of the Supreme Court of the United States.

Execution against Sebastien Hiriart.

DIST. COURT OF THE UNITED STATES, *In and for the East. Dist. of La.*

The President of the United States to the Marshal of the Eastern District of Louisiana, or to his lawful Deputy, GREETING:

You are hereby commanded that you demand from Sebastien Hiriart the sum of three thousand and one hundred dollars, with interest, costs, and damages, according to the mandate of the Supreme Court of the United States, cash which Jean Gassie Ballon lately recovered by judgment of the district court of the United States for the said district; and if he shall not pay the same on demand, that then you cause the same to be made out of the personal estate of the said Sebastien Hiriart, except slaves, in your district, if sufficient personal estate, exclusive of slaves, can be found therein; but if sufficient personal estate of said Sebastien Hiriart, exclusive of slaves, cannot be found therein, that then you cause the sum to be made out of the real estate and slaves of the said Sebastien Hiriart, in your district, whereof he was owner on the first day of June last past, into whose hands soever the same may have come.

And that you have those moneys before our said court to render to the said Jean Gassies Ballon, for the judgment aforesaid, on the second Monday of December, 1833, together with this writ.

Witness the hon. Samuel H. Harper, judge of the said court, this [SEAL.] 1st day of July, 1833.

(Signed) DUNCAN N. HENNEN, *Dept. Clk.*

Endorsed—This execution is to be credited with sixty-five dollars and fifty-seven cents.

(Signed) F. W. LEA, *Clk.*

Marshal's Return—Received July 4th, 1833.

Executed by levying on a tract of land situated in the parish of Point Coupee, and advertised for sale: subsequently a writ of injunction was issued from the honorable the judge of the United States' Court. Proceedings stopped, and this writ now returned.

(Signed) A. WADDELL *Dept. Marshal.*

Returned into court this 17th January, 1834.

(Signed) L. C. BACON, *U. S. Dept. Marshal.*

End of Record of Jean Gassies Ballon vs. Pierre Gassies.

And afterwards, to wit, on the 18th day of January, A. D. 1834, into the said court came Jean Gassies Ballon, the defendant in the petition for the injunction dissolved as aforesaid, and by his counsel ordered the following execution to be issued, to wit:

DISTRICT COURT OF THE UNITED STATES, *In and for the East. Dist. of Louisiana.*

The President of the United States to the Marshal of the Eastern Dist. of Louisiana, or to his lawful Deputy, GREETING:

You are hereby commanded, as heretofore, that you demand from Sebastien

Hiriart the sum of three thousand one hundred dollars, with interest, at the rate of five per cent. per annum, from the first day of December, 1829, till paid, and costs of suit, together with costs and damages, at the rate of six per centum per annum, according to the mandate of the Supreme Court of United States, cash which Jean Gassies Ballon, lately recovered by judgment of the district court of the United States for the said district; and if he shall not pay the same on demand, that then you cause the same to be made out of the personal estate of the said Sebastien Hiriart, except slaves, in your district, if sufficient personal estate, exclusive of slaves, can be found therein; but if sufficient personal estate, exclusive of slaves, cannot be found therein, that then you cause the sum to be made out of the real estate and slaves of the said Sebastien Hiriart, in your district, whereof he was owner on the first day of June last past, into whose hands soever the same may have come. And that you have those moneys before our said court to render to the said Jean Gassies Ballon, for the judgment aforesaid, on the 17th day of February, 1834, together with this writ.

Witness the hon. Samuel H. Harper, judge of the said court,
[SEAL.] this 18th day of January, 1834.

(Signed) DUNCAN N. HENNEN, *Dept. Clk.*

Endorsed—This execution is to be credited with sixty-five dollars and fifty-seven cents.

(Signed) DUNCAN N. HENNEN, *Dept. Clk.*

And afterwards, to wit, on the 12th day of April, 1834, at a special session of the said court, the following order of court was made, to wit:

Special Court.—April 12th, 1834.

Present hon. Samuel H. Harper.

SEBASTIEN HIRIART *vs.* JEAN GASSIES BALLON. } No. 3,321.

On motion of John Slidell, esq., of counsel for S. Hiriart, it is ordered that the defendant, Jean Gassie Ballon, show cause, on Monday, the 14th inst., at 11 o'clock, A. M., why the execution issued in this case should not be quashed, and all further proceedings on the judgment, rendered in this case, suspended on the ground that the Supreme Court has accorded a writ of error which had been refused by this court before the execution issued.

And that John Nicholson, marshal of the United States for the eastern district of Louisiana, have notice of this motion.

Marshal's Return.

Service hereof acknowledged.

(Signed) JOHN NICHOLSON, *U. S. M.*

Rec'd on the 12th, at 6 P. M. Served on the 14th on P. Soule, personally, and returned.

(Signed) L. C. BACON, *D. M.*

Afterwards, to wit, on the 14th day of April, 1834, at a special session of the said court, the following order of court was entered of record, to wit:

Special Court.

MONDAY, *April 14th*, 1834.

Present hon. Samuel H. Harper.

SEBASTIEN HIRIART
vs.
JEAN GASSIES BALLON. } No. 3,321.

The rule taken by the plaintiff on the defendant came on this day before the court, when no opposition being made by the counsel for the defendant, it is ordered that the same be made absolute, on condition that the plaintiff enter into bond, with good and sufficient sureties, to respond to the judgment enjoined against by the plaintiff.

Afterwards, to wit, on the 18th day of April, 1834, came Sebastien Hiriart, by his attorney, John Slidell, and Achille Rivarde, as surety, and entered into the following bond, to wit:

Know all men by these presents, that we, Sebastien Hiriart, as principal, and Achille Rivarde, as surety, are held and firmly bound unto Jean Gassies Ballon, his heirs, executors, or assigns, in the sum of seven thousand five hundred dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents sealed with our seals, and dated this 18th day of April, 1834.

Whereas the above bounden Sebastien Hiriart has appeared, and filed a copy of a writ of error from an order of the United States' district court for the eastern district of Louisiana, dissolving an injunction obtained by him against an execution issued at the instance of said Gassies.

Now the condition of this obligation is such, that if the said S. Hiriart shall pay, or cause to be paid, the amount of the judgment enjoined by him in suit No. 3,321 of the docket of suits in the United States' district court, east. dist. Louisiana, and pay all costs and damages, in case he shall not support his writ of error, then this obligation to be null and void, or else to remain in full force and virtue.

(Signed) JOHN SLIDELL, *for*
S. HIRIART. [SEAL.]
A. RIVARDE. [SEAL.]

Attest:
(Signed) L. C. BACON.

Afterwards, to wit, on the 19th day of April, 1834, came John Nicholson, esq., marshal of the United States for the eastern district of Louisiana, and filed the following return to the writ of fieri facias, issued by Jean Gassie Ballon, against Sebastien Hiriart, on the 18th day of January, 1824, to wit:

March 1st, 1834. By virtue of this writ, I have this day seized all the right, title, interest, and claim of Sebastien Hiriart, in and to a certain piece or parcel of land situated in the parish of Point Coupee, fronting the river Mississippi 11 arpens, back 40 arpens, adjoining on the upper side the lands of Edie Warfield of W. C., and the lower side by lands owned by Madame Ducoun.

(Signed) J. PARKISON, *Dept. Marshal.*

The above described property was duly advertised for sale, and appraisers summoned and sworn, when the execution of this writ was suspended by an

order of the court, in pursuance of a mandate of the Supreme Court, and is therefore returned in accordance thereto.

(Signed) JOHN NICHOLSON, *U. S. Marshal.*

Clerk's Office U. S. Dist. Court, East. Dist. of Louisiana.

I, Duncan Nicholson Hennen, clerk of the district court of the United States for the eastern district of Louisiana, do hereby certify the foregoing fifty-five pages to be a true and faithful transcript of all the record, proceedings, and evidence, introduced in the case of Sebastien Hiriart *vs.* Jean Gassies Ballon, No. 3,321 of the docket of suits in this court, so fully as the same remains on file in my office; and that the printed copy of rules of this court, embodied in this transcript, is a true copy from the records.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of the court, at the city of New Orleans, this 26th day of June, A. D. 1834.

DUNCAN N. HENNEN, *Clk.*

I, Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana, do hereby certify that Duncan N. Hennen, who has certified the foregoing transcript, is now, and was at the time of doing so, clerk of the district court of the United States for the eastern district of Louisiana; that the said certificate is in due form of law, and that to his official attestations full faith and credit are due.

[SEAL.] Witness my hand and seal, at the city of New Orleans, this 30th day of June, 1834.

SAM. H. HARPER, *Judge U. S.*

Know all men by these presents, that we, Sebastian Hiriart and John R. Grymes, are held and firmly bound unto Jean Gassies Ballon, in the full and just sum of three hundred dollars, to be paid to the said Jean Gassies Ballon, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 19th day of March, in the year of our Lord one thousand eight hundred and thirty-four.

Whereas lately at a district court of the United States, for the district of East Louisiana, in a suit depending in said district court, wherein Sebastian Hiriart, was plaintiff, and Jean Gassies Ballon, defendant, judgment was rendered against the said Sebastian Hiriart; and the said Sebastian Hiriart having obtained a writ of error, and filed a copy thereof in the clerk's office of the said district court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jean Gassies Ballon, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of August next.

Now the condition of the above obligation is such, that if the said Sebastian Hiriart shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) SEBASTIAN HIRIART, *by* JOHN SLIDELL. [SEAL.]

(Signed) JOHN R. GRYMES. [SEAL.]

Sealed and delivered in presence of

(Signed) D. W. MIDDLETON.

Approved: March 19th, 1833. J. MARSHALL.

CLERK'S OFFICE U. S. DIST. COURT,

NEW ORLEANS, *June 26th*, 1834.

I certify the within bond to be a true copy from the original on file in my office.

DUNCAN N. HENNEN, *Clk.*

Citation.

UNITED STATES OF AMERICA,

To Jean Gassies Ballon, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in August next, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the district of East Louisiana, wherein Sebastian Hiriart is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said Sebastian Hiriart, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John Marshall, chief justice of the Supreme Court of the United States, this 19th day of March, A. D. eighteen hundred and thirty-four.

J. MARSHALL,
Ch. Just. of the U. S.

March 19th, 1834.

Received 14th June, 1834. Served same day on John Gassie Ballon, by handing him a certified copy of the within citation, after reading and explaining the same, and reading to him the original citation. Returned same day.

JOHN NICHOLSON,
U. S. Marshal.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judges of the District Court of the United States for the District of Louisiana, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which in the district court before you, or some of you, between Sebastian Hiriart, plaintiff, and Jean Gassies Ballon, defendant, a manifest error hath happened to the great damage of the said Sebastian Hiriart, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court, to be then and there held; that the record and proceed-

ings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable John Marshall, chief justice of the said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-four.

WM. THOS. CARROLL, *Clk. Sup. Ct. U. S.*

Allowed:

J. MARSHALL, *Ch. Just. of the U. S.*

March 19th, 1834.

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SUPREME COURT OF THE UNITED STATES.

No. 47.

EDWARD LIVINGSTON, APPELLANT,

VERSUS

BENJAMIN STORY.

ON APPEAL FROM THE DISTRICT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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DISTRICT COURT OF THE UNITED STATES, *Eastern District of Louisiana*, } ss.

In Equity. *No.* 3,380.

Be it remembered that, on the third day of February, in the year of our Lord one thousand eight hundred and thirty four, into the district court of the United States for the eastern district of Louisiana, came Edward Livingston, of New York, and by his solicitors Henry Lockett and M. W. Hoffman, esqrs., filed the following bill in equity, to wit:

In Equity.

To the honorable the District Court of United States in and for the Eastern District of the State of Louisiana.

The bill of complaint of Edward Livingston, a citizen of the State of New York, humbly showeth:

That on or about the 25th of July in the year of our Lord one thousand eight hundred and thirty-two, your orator being in want of money applied

to Benjamin Story and John A. Fort, of the city of New Orleans, who agreed to lend to your orator a sum of twenty-two thousand nine hundred and thirty-six dollars, of which a part only was paid in cash, part in a note of John A. Fort, and eight thousand dollars, parcel of the said sum, was afterwards agreed to be paid to one John Rust, for the purpose and in the manner hereinafter set forth.

And your orator further shows, that to secure the payment of the said sum with interest at the rate of eighteen per cent. per annum, on the first day of February then next ensuing, your orator conveyed to the said Fort and Story a lot of ground, situated in the city of New Orleans, in the conveyance described as all that parcel of ground situated on the batture of the suburb St. Mary, between Common and Gravier streets, measuring eighty-two feet fronting Common street, one hundred and twenty-six feet, or thereabouts, fronting Tchapitoulas street, one hundred and forty-six feet fronting New Levee street; and bounded on the other side by a lot belonging to Messrs. Livermore, Morse, and Miller and Pierce, containing one hundred and twenty feet, or thereabouts; together with the buildings improvements, and all other appertenances to the same, belonging or in anywise appertaining as by the said sale, made before Hugues Lavergne, one of the notaries of the said city, a certified copy whereof is ready to be produced to this honorable court, doth appear.

And your orator showeth, that, at the time your orator executed the said act of sale, the said Fort and Story signed and delivered to your orator a counter letter by which they promised on the payment of the sum of twenty-five thousand dollars, being the sum so advanced to your orator, with interest at the rate of 18 per cent. per annum, on or before the first day of February then next, to reconvey the said property to your orator; but if payment of the said sum should not be made on the said first day of February, that they, the said Fort and Story, would cause the said property to be sold, and after paying the said twenty-five thousand dollars, and the costs of sale, that the residue should be delivered to your orator, as by the said agreement made according to law, in duplicates, and recorded by the notary aforesaid, to which your orator for greater certainty refers, doth appear.

And your orator further showeth, that, at the time of the said sale, the whole of the premises were covered with a brick building intended for fifteen stores, three fronting on Common street, six on Levee street, and six on Tchapitoulas street; that the cellars were dug, and the partition and outer walls carried up to a considerable height; and that your petitioner had made a contract with one John Rust, who engaged, for the sum of eight thousand dollars, to finish the same, a great portion of the materials having been prepared, and much of the carpenters work already done.

That your orator delivered the contract, so made with John Rust, to the said Fort and Story, who engaged to pay him the said sum of eight thousand dollars, which sum was enclosed in and formed part of the sum of $229\frac{26}{100}$ so loaned, by the said Fort and Story, to your orator, as aforesaid. And the same was considered as cash, and the interest thereon calculated at the rate of 18 per cent. with the other cash payment, so as to make, with the interest on the whole, the sum of $25,000 mentioned in the act as the consideration of the sale.

And your orator further shows, that the property above-mentioned was, at the time of the said loan was made, worth, at the least, the sum of sixty thousand dollars, and is now worth double that sum; that the said Fort and Story

took possession of the said lot, and that your orator soon after the said transaction left the city of New Orleans, where he then resided, on a visit to the State of New York, expecting, during his absence, that the said stores would have been finished, or that, at least, some of them would have been in a state to be let, the situation being one of the most favorable for trade; your orator having received offers from good tenants to hire some of them at rents that would have given a rate of interest equal to a principal of ten thousand dollars each for three of the smallest of said stores.

But your orator shows, that on his return that he found little or nothing had been done to the said stores, and that the eight thousand dollars had been, as he was informed, paid the said John Rust, so that if the property had been sold, on the first of February, according to the terms of the counter letter, it would not have produced any thing like its full value.

Your orator therefore applied to the said Fort and Story for a further time to make the payment of the sum so loaned to him, as aforesaid, which they would not consent to, but on the following conditions: that the property should be advertised for sale on the 2d day of June then next; that the sum due to them should be increased from $25,000 to $27,500, which sum was composed, first, of the said $25,000; secondly, of $1,500, for interest, for the delay of four months, at 18 per cent.; thirdly, of $800 for auctioneer's commissions; of $50 for advertising; and of $200 arbitrarily added, without any designation, of which a memorandum was given by the said Fort and Story, and is now ready to be produced; and that your orator should annul the counter letter so executed, as aforesaid, to him by the said Fort and Story.

That your orator, being entirely at the mercy of the said Fort and Story, consented to these terms in hopes that in the intermediate time the very extraordinary pressure for money, which then prevailed, would subside; but contrary to his expectations the pressure became greater, and on the 2d June, in order to obtain a delay of 60 days he was forced to consent to sign a paper by which it was agreed that the debt should be augmented to the sum of $27,830 76; and that if the same was not paid on the 5th of August, then the property should belong to the said Fort and Story without any sale; but there was no clause by which your orator should be discharged from the payment of the sum so borrowed, as aforesaid, whereby he would have been liable to the payment of the sum so advanced in case the property had fallen in value.

And he further shows, that, on the 5th day of August above-mentioned, the said Fort and Story demanded by a notary the full sum of $27,830 36, which included the said charge of $600 for auctioneer's fees for selling, although no sale had been made, and all the other illegal charges above-stated and non-payment protested for damages and interest on the said sum, thereby showing their intent to hold your orator responsible for the sum demanded, if the premises should, by any accident, become insufficient in value to pay the same.

And your orator shows that the said Fort and Story remained in possession of the said premises until the death of the said John A. Fort, which took place some time in the year 1828, and that after his death the said Benjamin Story took the whole of the said property by some arrangement with the heirs of the said John A. Fort, and is now and ever since has been in the sole possession thereof, and that the said John and Benjamin in the lifetime of the said John, and the said Benjamin, after the death of the said

John, have received the rents and profits of the said property to the amount at least of $60,000.

And your orator is advised that, and believes that, he has a right to ask and recover from the said Benjamin Story the possession of the said property, and an account of the rents and profits thereof, the said conveyance of the same from your orator having been made on a contract for the loan of money, and although in the form of a sale, in reality only a pledge for the repayment of the same, the act by which your orator agreed to dispense with the sale being void and of no effect in law.

Your orator therefore prays that the said Benjamin Story may be cited to appear and answer to this bill of complaint, and particularly that he may, on his corporal oath, set forth and declare—

1st. Whether he and the said John A. Fort did not on or about the time, for that purpose herein stated, agree to lend to your orator the sum of $25,000, deducting the interest at the rate of 18 per centum per annum or any other, and what sum or at any other, and what rate of interest?

2d. What sum was actually advanced by them, the said John A. Fort and Benjamin Story, to your orator, and how was the same advanced? Setting forth precisely how much in cash, and how was the same paid, whether in drafts or any and what bank, and for what amount or in bills? And whether part of the said amount was not paid in the promissory note or notes of them, the said Fort and Story, or of one, and which of them, and what was the amount of such notes, and when were the same payable; what sum did they or either of them pay to John Rust, and at what times, and did not said payments form part of the sums mentioned in the consideration of the deed of sale?

3d. Did not the said Fort and Story require, as a security for the sum so advanced, that your orator should execute a sale, instead of a mortgage of the property hereinbefore described? And did they not execute a counter letter of the tenor hereinbefore for that purpose set forth?

4th. Did not the said Fort and Story consent to postpone the sale of the said property until the 1st of June, in the year 1823; and did they not exact, as a condition of such postponement, that your orator should cancel the said counter letter; and that he should further pay the sum of two thousand five hundred dollars in addition to the sum of $25,000, originally mentioned; and whether they, the said John and Benjamin, did not deliver or cause to be delivered to your petitioner a memorandum of the said condition, and of the items composing the said additional sum; and whether they were not of such tenor and effect as are hereinbefore set forth, or of what other tenor and effect?

5th. Whether, after the death of the said John A. Fort, he, the said Benjamin Story, did not take upon himself the settlement of the estate of the said John, either as executor or administrator; and whether he, the said Benjamin, did purchase or in some other way procure the interest of the said John A. Fort in the said premises to be vested in him, and at what time, and on what consideration?

And that the said Benjamin Story may, on oath, set forth and file in this honorable court a full, true, and perfect account of all the rents and profits which he and the said John A. Fort, or either of them, have received from the premises, stating the dates of such receipts, and the names of the persons from whom such sums were received, and may produce the books of account as well of the said John A Fort, as of him, the said Benjamin

Story, on which there is any entry in relation either to moneys, notes, or other advances made to your orator or paid on his account, or the rents and profits of the said premises; and also, may state what expenses have been incurred in the erecting, repairing, or safe-keeping of the said property, and to whom and when such payments were made, and particularly for what purposes.

And that an account may be taken under the direction of this honorable court, between your orator and the defendants to this bill, in which your orator agrees that he shall be charged—

First. With such sum as shall be shown to have been advanced to him or paid on his account under the loan made to him on the 25th of July, 1822, with the interest that he agreed to pay of eighteen per cent. per annum, to be calculated upon each advance from the time it was made until the 5th of August, 1823, and after that time at legal interest.

Secondly. With all reasonable expenditures judiciously made and incurred by the said John and Benjamin in building, repairing, and safe-keeping of the said property. And that your orator be credited, in such accounts, with all such sums as the said John and Benjamin, or either of them, have received, or might, if they had used due diligence and care, have received from the said property; and that in such account the rents and profits be applied as the law requires.

1st. To the payment of the sums necessarily incurred in building and repairing; secondly, to the payment of interest on the sums which shall appear to have been advanced on the said loan; and thirdly, to the discharge of the principal of the said loan.

And your orator prays that, if on said account it shall appear that there is a balance due to him, as he hopes to be able to show will be the case, that the said Benjamin Story may be decreed to pay the same to him, and to surrender the said property to him, and that if any balance be found due from your orator, that the said Benjamin Story may be decreed to deliver the said property to your orator on his paying or tendering to him the said balance; and that your orator may have such other relief as the nature of his case may require; and that the said Benjamin Story, in his own right, and also as executor of the last will and testament of the said John A. Fort, or in any other manner representing the estate of the said John A. Fort, may be summoned to answer this bill, your orator averring that he is a citizen of the State of New York, and that the said Benjamin Story is a citizen of the State of Louisiana, now resides in New Orleans.

(Signed) H. LOCKETT, M. W. HOFFMAN. } *Attys.*

Whereupon the following subpœna issued from the clerk's office, to wit:

The President of the United States of America to the Marshal of the Eastern District of Louisiana, or his lawful Deputy, GREETING:

You are hereby commanded to summons Benjamin Story to appear in the district court of the United States for the eastern district of Louisiana to be holden in the city of New Orleans on the third Monday of February, 1834, to answer a bill exhibited against him in the said court, together with certain nterrogatories therewith filed by Edward Livingston; and this he shall in

no wise omit, under pain of the penalty that will fall thereon; and have you then and there this writ.

Witness the hon. Sam. H. Harper, judge of our said court at
[SEAL.] the city of New Orleans, this 5th day of February, 1834, and in the 58th year of the Independence of the United States.

(Signed) DUNCAN N. HENNEN, *Dept. Clk.*

Marshal's Return.

Received 5th February, 1834. Served same day on Benjamin Story by handing him copies of the within and petition. Retured into court same day.

(Signed) L. C. BACON, *U. S. Dept. Marshal.*

And whereupon also issued the following subpœna from the clerk's office, to wit:

The President of the United States of America to the Marshal of the Eastern District of Louisiana, or his lawful Deputy, GREETING:

You are hereby commanded to summons Benjamin Story, executor of the last will and testament of John A. Fort, deceased, to appear in the district court of the United States for the eastern district of Louisiana to be holden at the city of New Orleans, on the third Monday of February, 1834, to answer a bill exhibited against him in the said court, together with certain interrogatories therewith filed by Edward Livingston, and this he shall in no wise omit, under pain of the penalty that will fall thereon, and have you then and there this writ.

Witness the honorable Samuel H. Harper, judge of our said
[SEAL.] court, at the city of New Orleans, this 5th day of February, 1834, and in the 58th year of the Independence of the United States.

(Signed) DUNCAN N. HENNEN, *Dept. Clk.*

Marshal's Return.

Received 5th February, 1834. Served same day on Benjamin Story by handing him a copy of the within subpœna and copy of the petition, and made return into court.

(Signed) L. C. BACON, *U. S. Dept. Marshal.*

Afterwards, to wit, on the 17th day of February, A. D. 1834, into the said court came Benjamin Story, and by his solicitor, L. Pierce, esq., filed the following demurrer, to wit:

EDWARD LIVINGSTON *vs.* BENJAMIN STORY. } *U. S. Dist. Court East. Dist. in Chancery.*

The defendant by protestation not confessing all or any of the matters and things in the complainant's bill to be true in such manner and form as the same are therein set forth and alledged, does demur to the said bill and for cause of demurrer shows that the complainant has not, by his said bill, made such a case as entitles him, in a court of equity in this State, to any discovery from this defendant, touching the matters contained in the said bill or any or either of such matters, nor entitle the said complainant to any relief in this court, touching any of the matters therein complained of.

And for further cause of demurrer to said bill, he shows that by complainant's own showing, in the said bill, that the heirs of John A. Fort, who is therein named is a necessary party to the said bill, as much as it is therein stated that all the matters of which he complains, were transacted with this defendant, and John A. Fort, whose widow, the present Mrs. Luzenbourg, is the sole heir and residuary legatee, but yet the said complainant hath not made her party to the said bill, wherefore (*as*) as before, and for all the above causes, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and he prays the judgment of this honorable court, whether he shall be compelled to make any further and other answer to the said bill, and he humbly prays to be dismissed from hence, with his reasonable costs in this behalf sustained.

(Signed) L. PIERCE, *for Defendant.*

Afterwards, to wit, on the fourth day of March, A. D. 1834, the following entry of record was made at a regular and stated session of the said court, to wit:

TUESDAY, 4*th March*, 1834.

The court met, pursuant to adjournment.
Present hon. Samuel H. Harper.

EDWARD LIVINGSTON
vs.
BENJAMIN STORY. } No. 3,380.

This cause came on this day for a hearing before the court upon the demurrer filed by the defendant, when, after hearing the arguments of counsel, the court took time to consider.

Afterwards, to wit, on the twentieth day May, A. D. 1834, at a stated and regular session of the said court the following order of court was entered of record, to wit:

TUESDAY, *May* 20*th*, 1834.

The court met, pursuant to adjournment.
Present hon. Samuel H. Harper.

EDWARD LIVINGSTON
vs.
BENJAMIN STORY. } No. 3,380.

The court having maturely considered this case now order, adjudge, and decree, that the demurrer be sustained, and that the complainant's bill be dismissed.

Opinion of the Court.

EDWARD LIVINGSTON
vs.
BENJAMIN STORY.

This is a bill in equity brought to recover from the defendant certain real estate in the city of New Orleans, alleged to have been formerly pledged to secure a sum of money lent to the complainant; and, also, to compel the defendant to account to him for the rents and profits of said property.

To this bill the defendant has demurred on two grounds. First, that this is not a suit that can be maintained, in its present form, in a court of the United States sitting in Louisiana. Secondly, that a material party is omitted in the bill.

The first cause of demurrer only need now be discussed, inasmuch as the objection contained in the second may be removed by an amendment to the bill.

This is believed to be the second suit that has ever been attempted to be brought in this court by an original bill in equity, technically so called; and if it can be maintained, it will introduce a practice hitherto unknown to the local laws of Louisiana, and to the practice of her courts; and, consequently, both advocates and suitors, coming into this court hereafter, will be obliged to pursue a system of remedy for the attainment of their rights totally different from, and repugnant to, that which is pursued in the State tribunals; an inconvenience which it would seem Congress meant to avoid by the act of the 26th May, 1824, entitled "an act to regulate the mode of practice in the courts of the United States for the district of Louisiana."

The first suit of this kind, ever instituted in this court, was that of Hooke's Heirs *vs.* John Linton. The argument in that case proceeded solely on the ground of jurisdiction, viz., that as the complainant had a complete remedy under the laws of this State, he could not invoke the aid of a chancery court, being prohibited from doing so by the 16th section of the judiciary act of 1789; which declares that no suit in equity, in the courts of the United States, can be maintained where plain, adequate, and complete remedy may be had at law.

It was contended for the complainant in that case, as it is in this, that the word "law," used in the section, means the common law of England. I, however, decided that it meant *any law*, whether common, civil, or statute, that was in existence at the date of that act of Congress, or which thereafter might exist in any of the States of the Union; that if the word "law" in the section meant only the common law, Congress had closed the door upon all future legislation in the different States, by which existing *equitable* rights might be declared to be *legal* ones, so that whatever cases were not embraced by the common law as it stood in 1789, must continue, through all time, to be cognizable only in courts of equity; but that, at that very time, much of the common law had been altered or abrogated in many of the States by statute; and that, therefore, Congress could not have had an allusion, exclusively to the common law, as it then existed in England.

That, as it respects Louisiana, where the common law has not, never had, and I trust never will have existence, according to the construction contended, for every case would be one in equity; since it is manifest that relief, by the rules of the common law, could never be obtained in a State where they are unknown. The opinion on this point, thus expressed in the case of Hooke's Heirs *vs.* Linton, I still entertain: the question then is, do the laws of this State afford to the complainant, in this case, a plain, adequate, and complete remedy? I think they do. He seeks the discovery of certain facts on the oath of the party respondent. By the settled law of this State, and by the uniform practice under it, he has the right to propound, and to have answered on oath, any and all interrogatories which are pertinent to the controversy; and, although this was questioned in the argument, and a decision or two of the supreme court of this State cited to show that the provision of our law, in this respect, does not apply to this case; yet, I am of

opinion, that there is nothing in these decisions which ought to bear that construction.

If the complainant alleges fraud, deceit, or usury, or prays a settlement of account, the State laws provide ample remedies in all these cases; and it is every day's practice to grant relief to such cases.

The civil law being the basis of our system of jurisprudence, and that law being professedly founded on principles of equity, and the course of State legislation being in analogy with these principles, I cannot imagine a case that has not been provided for. The complainant here does not even allege in his bill that he has no remedy at law. When, then, both by the local law and the practice of the courts, a plain, adequate, and complete remedy may be had, why drag parties into a court of chancery, proverbial for chicanery and delay, the rules of which and the practice under them being but imperfectly understood by the legal profession in this State, and utterly unknown to the mass of the population.

But supposing, as the law formerly stood, this court would be bound to take jurisdiction of this case on the equity side of the court, has not the act of Congress of the 26th May, 1824, regulating the practice of the United States court, sitting in Louisiana, taken away that right, if it ever existed?

That act was made expressly to harmonize the practice of the United States Court with those of this State; and, with that view, was drawn up and presented by this very complainant when a member of Congress.

A disposition has been manifested by a former judge of this court to adopt the common law practice, of which I shall presently speak, which would have been as unintelligible to the people of Louisiana as is the Chinese language, and would have presented the strange anomaly of two courts sitting within a stone's cast of each other, administering the same law to the same class of citizens by rules as dissimilar as light and darkness; and to avoid such absurdity the law in question was made.

It declares that the mode of proceeding in civil causes, in the courts of the United States that now are, or hereafter may be established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the said State. This law then applies to all *civil causes;* and is not a suit in equity a civil cause? The provisions in this law are, that "the judge may alter the time, limited or allowed, for different proceedings in the State court, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such should exist, between such State laws and the laws of the United States." On the subject now before me, I know of no discrepancy between the State laws and those of the United States; and I have made no rule, therefore, to avoid it, which the act requires to be done, if necessary.

As to the construction of this act the counsel for the complainant have referred me to the case of Parsons *vs.* Bedford et als., (3 Pet. 444,) and to a case in 6 Peters, 648. In the first of these cases the court very properly say, "that it was not the intention of Congress to give an absolute, an imperative force to the modes of proceeding in Louisiana, for if they should be *repugnant* to the acts of Congress, or not in conformity with the organization of the United States courts, the judge is at liberty to modify them; but, say the court, "the judge a quo expressed an opinion that the court of the United States is not governed by the practice of the State of Louisiana;" and this they say would be correct, if, in the particular complained of, the court had

adopted any rule superseding that practice; if no such rule had been adopted, the act of Congress made the *practice of the State* the rule for the court of the United States. Unless, then, such a special rule existed, the court was bound to follow the general enactment of Congress on the subject and pursue the State practice. So here there is no rule on this subject, *there is no rule on this subject*, therefore I am bound to pursue the State practice; and whoever heard of a suit in equity, technically so called, being instituted under the practice of the State courts?

In the case cited from 3d Peters, it is also said, "of itself, the course of proceeding under the State laws of Louisiana, could have no intrinsic force in the court of the United States, organized in that State," and the same thing is affirmed, in the case cited from 6th Peters, respecting the laws of Maryland. But in the first case the court say, "the act of Congress adopts the State practice in Louisiana, which must be obeyed;" and they would have said the same thing, in the latter case, if a similar act of Congress had been passed for the State of Maryland.

These cases ought rather to have been relied on by the respondent, in favor of his doctrine, than by the complainant; every one knew that State laws *per se* cannot govern the United States courts, in point of practice; but if Congress adopt them as they have done in this State, they are imperative until altered by a rule of the court in the cases specified.

By an act of Congress, passed on the 19th May, 1828, it is provided, that in those States of the Union, in which the common law prevails, and which have been adopted into the Union since the 29th day of September, 1789, the practice in the United States court sitting therein, shall be, in cases of common law, in conformity with the practice pursued in the highest court of original general jurisdiction of the same; and in proceedings in equity, according to the principles, rules, and usages, which belong to courts of equity.

Judge Conklin, in his treatise, at page 199, in commenting on this act of 1828, says, "in order to determine a question of practice, (and it is a question of practice I am now considering,) we are to ascertain—

"1. Whether it is specifically provided for by any act of Congress; if not,

"2. Whether it is specifically provided for by the rules of the court in which it arises; and if not, then, finally we are to inquire what was the practice when the point in question in the supreme court of the State, where the question arises, on the 29th September, 1789, or on the 19th of May, 1828, according as the point to be settled arises in a State existing at the former date, or in one subsequently admitted into the Union."

Now, in this case, there is no act of Congress declaring specifically that such a suit shall be commenced on the equity side of the court. Nor is there any rule of this court to that effect; as this State was not in existence in 1779, it is clear no practice from any of its State courts can be invoked.

But in 1828 we had a supreme court, but in which a suit of this nature and form was never instituted. According, then, to this author's tests, this suit cannot, on the point of practice, be maintained. We are, however, not reduced to the necessity of avoiding it by logical deductions, for by the last section of the act, Louisiana is, eo nomine, excepted from the whole operation of the law, and why? Doubtless, because Congress had already given a code of practice to Louisiana, by their act of the 26th May, 1824, by which she is to proceed in the court of the United States according to the practice in her State courts, which recognize none of the technicalities incident to a court of chancery.

If this act of 1824 does not exempt us from these evils, and as we cannot have the benefit of the provisions of the act of 1828, as just shown, then it follows we must be governed by the practice of the high Court of Chancery, in England, as a necessary result from one of the rules of the Supreme Court on the subject of chancery practice.

We must commence by bill and *subpœna* filed in the office of the six clerks! which lay the foundation for *proclamations* and *attachments* to compel an appearance, and perhaps to a *commission of rebellion* against the party for not obeying the king's proclamations according to his allegiance; but if the party should be finally caught, he is first to be *improsend* for his contempt, and kept there until he answer. He is not permitted to pray any thing in his answer, but to be dismissed from court. If he has any relief to pray against the plaintiff he must do it by a *cross-bill*, and this leads to a *supplemental bill*, and perhaps to a *bill of interpleader*. In order to ascertain disputed facts, as no jury can appear in a court of chancery, a *feigned* suit must be brought in a court of law; as for instance, if the fact disputed is, whether A was heir at law to B, the party holding the affirmative states, in his *declaration*, that he has laid a wager of five pounds, with the defendant, that A is heir to B, and then avers that he is so, and therefore demands the £5. What contemptible jugglery!

It is owing to such chicanery, that a suit in chancery is rarely decided, in England, during the life time of the original parties. And is this system of procedure in reserve for Louisiana? If it be, then *interitus rerum publicarum*.

The position I have endeavored to maintain is not that the United States court here, is deprived of any of the equity power conferred on other judges of the United States; but that its exercise is to be in conformity with the course of proceeding established in the State courts in similar cases.

In Louisiana the right to an equitable decision is secured to suitors in her courts. Art. 21 of the Civil Code declares "that, in civil matters, where there is no express law, the judge is *bound* to proceed and decide according to equity. To decide equitably an appeal is made to natural law and reason, or received usages, where positive law is silent." To attain these equitable decisions the usage under the civil law offered the remedy or practice. All suits under that practice proceed on petition and answer, in which the parties are permitted to state their cause of action or defence, in their own words and way, according to the facts of the case, without being trammelled with the subtle niceties of the chancery practice, as existing either in the United States, or in England; and if a point should arise on which the law is silent, the judge must resort to those acknowledged principles of natural law and reason, which must govern all chancellors in whatever country they may preside; but the application of these principles does not necessarily depend on a particular set of rules of procedure.

In England, and in all the States of the Union, except Louisiana, a certain *formula* of proceeding has been adopted for the purpose of conducting those courts to the proper decision of equitable rights; while under the civil law, other modes are prescribed for the attainment of the same end; and the national legislature, in strict justice to the people of Louisiana, have given to them their peculiar mode of practice by the acts of 1824 and 1828.

If that be so, the doctrine laid down in Robinson *vs.* Campbell, 3 Wheaton, 212, "that the remedies in the court of the *United States* are to be in common law, or in equity, not according to the practice of the State courts,

but according to the principles of common law and equity, as distinguished and defined in England," cannot apply to the State of Louisiana, without a total disregard of the laws made in her favor.

The judges of the Supreme Court may experience some inconvenience in the examination of cases coming before them on appeal, owing to our peculiar mode of procedure; but is that a good reason for taking from us a right secured by law?

It is not correct to say that Congress has the power to prescribe arbitrary rules of practice in the federal court, sitting in Louisiana, by which proceedings, according to the course of the common law shall be introduced.

The civil law, and the remedies according to it, are the birth-rights of every Louisianian, and secured to him at the time Louisiana was received into the Union; and as no suit can be maintained in the court of the United States here, unless one of the parties is a citizen of this State, it follows that such citizen must be deprived of his birth-right, whenever *foreign* remedies are applied to him in courts of justice. The constitutional provision that the judicial power of the courts of the United States shall extend to all cases of law and *equity* does not imply that equitable *rights* can only be enforced by the arbitrary *rules* of *practice* of the high Court of Chancery in England. If equity be administered in *any mode*, the terms of the constitution are complied with.

After all, I am by no means sanguine that the opinions here expressed will be sanctioned by the Supreme Court of the United States, should this case go up on appeal. From some recent decisions in that tribunal, it would seem that the practice in this court, conforming as near as the law permits to the State practice, is either not understood, or is disapproved.

In the case of the United States *vs.* Dick and Cox, (6 Peters,) the judgment rendered on the verdict of the jury, was reversed on the ground that the judgment was entered erroneously, the court saying, "upon no possible ground can this judgment be sustained," and ascribes it to mistake; and yet it was entered in strict conformity with the State practice in such cases. The debt being *in solido*, and each debtor being bound for the whole amount, it was proper to enter the judgment against each for the whole; but payment by any one would discharge the others as to the original creditor. (C. Code, Art. 2,086, et seq.)

In an injunction case of the Heirs of Dubourg *vs.* the United States, the cause was remanded for the purpose of being referred to a commissioner. I presume, on the authority of the case of Harding et als. *vs.* Handy et als., (11 Wheaton,) where it is said, "it is not the province of the court to investigate items of an account, but they will be referred to a *master*, &c." If I had conceived that I had the power so to refer the case, I would gladly have done so; but, as such an officer as a *master* in *chancery* is unknown here, I could not refer the matter to him. By the consent of parties the case has since been referred to a referree; but whether he will consent to perform that duty is uncertain. If he does not, where is the power to compel him? In that event, the case must remain undecided.

At the present session of the Supreme Court a mandamus has issued commanding this court to sign, and make executory an incomplete judgment of a former judge, when both the law and practice of this State required that it should have been signed within three days after its rendition by the judge who caused it to be entered, otherwise it had no force. I have not heard the reasons assigned for awarding this *mandamus*, but presume it was consi-

dered as a judgment at common law, which either required no signature of the judge, or that such signature was a mere formal or ministerial act. With us, however, it is considered as the very *soul* of the judgment, which would, for want of it, be a dead letter.

I have not made these strictures for the purpose of recrimination; but as we have no immediate representative on the bench of the Supreme Court, I indulge the hope that if they should fall under the eye of that tribunal, it may be induced to revise and correct any errors it may have fallen into respecting our practice, should similar cases arise in future. Lest it might be thought elsewhere that it is prejudice or perversity which prevents us from adopting a similar practice to that which prevails in the other States, I will take the liberty of saying, in the words of Achilles, speaking of Hector's temerity in attacking him—

"He tried it once, and scarce was saved by Fate."

Some emigrant common-law lawyers, as they considered themselves, persuaded a former judge of this court that the dignity of the United States court was concerned in the adoption of a similar practice with that in the circuit courts, and accordingly the system of special pleading was commenced. After a great deal of research in books of *forms* they managed to carry on the pleadings to a *surrejoinder*, still no issue was made up. Here their science failed them, and to the infinite amusement of those who were not concerned, and to the utter discomfiture of those who were, the latter mutually agreed to withdraw all their pleas to convert the *declaration* into a petition, and to try the cause by the rules of common sense.

Since that period, up to the time of exhibiting these bills in equity, we have been quietly permitted to follow the old practice of petition and answer; and no lawyer fresh from the study of the common law and its forms, who has practised here for six months, but is so well convinced of the superiority of our practice, that he labors harder to forget the common law formulary than he ever did to learn it.

It is the interest of the bar here to strive to avert, rather than to invite so great a calamity. If they should succeed, they will have erected, for themselves, a worse than Egyptian labyrinth, in which every stranger to its intricacy perished who entered there without a guide.

Afterwards, to wit, on the 4th of June, A. D. 1834, into the said court came the complainant, Edward Livingston, by his solicitors, H. Lockett and M. W. Hoffman, esqs., and filed the following petition of appeal, to wit:

IN THE MATTER OF EDWARD LIVINGSTON *vs.* BENJAMIN STORY. } *In Equity.*

To the honorable the Judge of the District Court of the United States in and for the Eastern District of Louisiana.

The petition of Edward Livingston, a citizen of the State of New York, respectfully shows:

That your petitioner is advised and believes that there is error in the judgment rendered in the matter of your petitioner *vs.* Benjamin Story, a citizen of the State of Louisiana, on the demurrer filed by said defendant.

He therefore prays leave to appeal to the Supreme Court of the United

States, on giving bond, with M. W. Hoffman and Henry Lockett, as securities, in such sum as the court may direct, and he prays such relief as the case may require.

(Signed) LOCKETT & HOFFMAN,
Attorneys and Proctors.

Judge's Order.

Be it so, on the plaintiff's entering into bond with M. W. Hoffman and Henry Lockett, as sureties, in the sum of five hundred dollars, conditioned according to law.

(Signed) SAMUEL H. HARPER, *Judge U. S.*

Appeal Bond.

Know all men by these presents, that we, Edward Livingston, as principal, H. Lockett and M. W. Hoffman, as sureties, are held and firmly bound unto Benjamin Story in the sum of five hundred dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals, and dated this 4th day of June, 1834.

Whereas the above bounden Edward Livingston has this day appeared and filed a petition for an appeal from a final decree rendered against him in the suit of Edward Livingston *vs.* Benjamin Story in the district court of the United States for the eastern district of Louisiana, on the 20th day of May, A. D. 1834.

Now the condition of this obligation is such that if the said Edward Livingston shall prosecute his said appeal to effect in the Supreme Court of the United States, and pay all costs and damages, in case he shall not support the same, then this obligation to be null and void, or else to remain in full force and virtue.

For EDWARD LIVINGSTON.
H. LOCKETT. [SEAL.]
H. LOCKETT. [SEAL.]
M. W. HOFFMAN. [SEAL.]

Attest:
DUNCAN N. HENNEN.

CLERK'S OFFICE, U. S. DIST. COURT, *Eastern District of Louisiana.*

I, Duncan Nicholson Hennen, clerk of the district court of the United States for the eastern district of Louisiana, do hereby certify the foregoing twenty-six pages to be a true and faithful transcript of the record and proceedings in the case of Edward Livingston *vs.* Benjamin Story, No. 3,380 on the docket of suits in this court, so fully as the same remains on file in my office.

In testimony whereof I have hereunto set my hand and affixed
[SEAL.] the seal of the court, at the city of New Orleans, this 16th day of June, A. D. 1834.

DUNCAN N. HENNEN, *Clk.*

I, Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana, do hereby certify that Duncan Nicholson Hennen, who has certified the foregoing transcript, is now and was at the

time of doing so, clerk of the district court of the United States for the eastern district of Louisiana; that the said certificate is in due form of law, and that to his official attestations full faith and credit are due.

Witness my hand and seal at the city of New Orleans, this
[SEAL.] 25th day of June, A. D. 1834.

SAM. H. HARPER, *Judge U. S.*

THE UNITED STATES OF AMERICA,

To Benjamin Story, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of August next, (1834,) pursuant to an order of appeal filed in the clerk's office of the dist. court of the United States for the eastern district of Louisiana, wherein Edward Livingston is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the Edward Livingston, as in the petition of appeal mentioned, should not be corrected; and why speedy justice should not be done to the parties in that behalf.

June 25th, 1834. SAM. H. HARPER, *Judge U. S.*

Received this citation 2d July, 1834. Served copy thereof, and copy of petition of appeal on Benjamin Story, esq., personally, on the same day, and now make return this 2d July, 1834.

JOHN NICHOLSON,
U. S. Marshal, Eastern Dist. of Lou'a.

IN THE SUPREME COURT OF THE U. S.

JANUARY TERM, 1835.

THE LIFE AND FIRE INSURANCE COMPANY against CHRISTOPHER ADAMS. } On motion for a mandamus to the District Court for the Eastern District of Louisiana.

This cause was before the Court at the last term. 8 Peters' Rep. 306.

On the 16th January, 1824, the Defendant executed a mortgage to the Plaintiffs, of a plantation, &c., and 70 slaves, for securing divers notes, amounting to 32,522 dollars 50 cents, payable in instalments—(page 9 of the printed record.) No part of said sum having been paid, and a summary process having been issued, and his property seized thereunder by the Marshal, he entered into a transaction on the 2d May, 1826, (page 12,) and thereby confessed judgment for the notes then due, and agreed that judgment should be confessed for the remaining notes as they should fall due, (the transaction containing a warrant of attorney for that purpose,) stipulating for a stay of the execution and sale of the mortgaged property until the 18th January, 1829, when the last note would reach maturity, the Plaintiffs to retain all their liens in and on the mortgaged property. Judgment was, in furtherance of such compromise, entered on the minutes of the District Court, on the 18th May, 1826, in the life of Judge Robertson, who was sick at the time, and died before signing the same. The words of the entry (page 16) are:

"It is ordered and decreed that judgment be entered up in "favor of the Plaintiffs for all the notes which have become "due, [naming the sums,] and that, in pursuance of said "transaction, whenever any of the said notes mentioned "therein as yet not arrived at maturity, shall become due,

"judgment shall be entered up for the Plaintiffs, upon all "and every of said notes as they arrive at maturity, with "interest from the time they severally become due, until "final payment; and that there shall be a stay of execution "on said judgment, until the 18th January, 1829, and that "if the amount of the judgment is not then paid, including "principal, interest, and costs, on that day, that the lands, "&c. described in the mortgage, shall be sold to satisfy the "judgment in the premises."

Judge Harper having refused, as the successor of Judge Robertson, to sign this judgment, a mandamus was granted at the last term, (page 15) requiring him "to sign said judgment, and order execution to issue thereon." He signed the same on the 7th March last. An application was made to him to order an execution to issue for the amount of all the instalments. He refused so to order. He was then asked to permit a further judgment to be entered on the records of the Court, for the notes which had become due subsequent to the 18th May, 1826, and a paper to that effect (p. 18) was presented to him, which he refused to sign or permit to be filed—stating that he should not sign any thing more than Judge Robertson had omitted to sign. The Plaintiffs caused an execution to issue for the whole amount of the debt, (p. 19) which was quashed by Judge Harper, on motion for that purpose, and another execution (p. 22) ordered to issue for the notes which had become due prior to 18th May, 1826. The Marshal refused to execute this writ unless indemnified by the Plaintiffs; because, as he alleges in his return, (p. 6) Adams had taken the benefit of the insolvent act of Louisiana, and Nathaniel Cox had been appointed provisional Syndic, to whom the mortgaged property had been surrendered. Application was then made by the Plaintiffs, for the interposition of the Court, that the Marshal

might be ordered to proceed without requiring indemnity, or show cause why an attachment should not issue against him for refusing to execute the process of the Court, or for other relief. Judge Harper dismissed the application. He was also again applied to, to sign the confession of judgment for the notes which became due after the 18th of May, 1826, but refused.

The application of the Plaintiffs is for a further mandamus to Judge Harper, commanding him—

1st. To proceed, by attachment or otherwise, to compel the Marshal to execute the writ of seizure, &c., issued to him on the 30th of April, 1834; and

2d. To order execution to be issued upon the transaction and original judgment, for the instalments which became due subsequently to the 18th May, 1826; or if such execution cannot issue without a further judgment, then, that he enter and sign judgment for such instalments, and award execution therefor.